Supreme Court of the United States

OCTOBER TERM, 1968

No. 646

JAMES F. O'CALLAHAN,

Petitioner,

—vs.—

J. J. PARKER, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Page
Docket entries in the proceeding below	1
Petition for a writ of habeas corpus dated March 28, 1966	3
Respondent's return and answer to petition	13
Petitioner's traverse dated May 13, 1966	19
Memorandum opinion of the United States District Court for the Middle District of Pennsylvania dated August 12, 1966, Follmer, J.	21
Opinion of the United States Court of Appeals for the Third Circuit, Per Curiam, dated February 2, 1967	27
Judgment of the United States Court of Appeals for the Third Circuit, dated February 2, 1967	28

Page

Opinion of the United States Court of Appeals for the Third Circuit on reargument, dated March 8, 1968 ____ 29

Judgment of the United States Court of Appeals for the Third Circuit, on reargument, dated March 8, 1968 ____ 35

Order of the United States Supreme Court granting petition for certiorari dated October 14, 1968 ____ 36

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

No. 756

JAMES F. O'CALLAHAN, PETITIONER

vs.

J. J. PARKER, Warden, United States Penitentiary Lewisburg, Pennsylvania, and the DEPARTMENT OF THE ARMY, United States Army, Washington, D. C., RESPONDENTS

For Petitioner:

Pro Se

For Respondent:

Bernard J. Brown, Esq., U. S. Attorney
Harry A. Nagle, Esq., Asst. U. S. Attorney
Abraham Memrow, Lt. Col., JAG, Dept. of Army

Counsel:

Bruce E. Stevenson, Maj., JAG, Dept. of Army.

Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 2 mailed	Clerk	4/ 7/66	O'Callahan	5.00	
J.S. 3 mailed	Marshal	4/11/66	CD 39		5.00
		9/21/66	O'Callahan	5.00	
Violation	Docket fee		Notice Appl.		
Title					
Sec.					
JS5 4/ 7/66					
JS6 8/12/66					

HABEAS CORPUS DOCKET

DATE		PROCEEDINGS
1966		
April 7	1.	Petition for writ of habeas corpus.
April 15	2.	Order (F) Rule granted, returnable May 19, 1966.
		Copy to petitioner, respondent, and US Attorney.
April 18	3.	Motion for a writ to show cause.
April 19	4.	Order, Motion for writ to show cause denied.
April 29	5.	Motion for a Speedy Hearing.
May 5	6.	Respondent's Return to Rule to Show Cause.
May 5	7.	Memorandum of Points and Authorities.
May 9	8.	Certificate of Service by Mail.
May 19	9.	Petitioner's Traverse to Respondents' Answers to Rule to Show Cause, and Motion for assignment of counsel.
Aug. 12	10.	Memorandum and Order; Motion to dismiss granted, petition dismissed, motion for assignment of counsel denied. Copies to petitioner, Warden Parker, JAG, and US Attorney.
Aug. 18	11.	Copy order CCA (Maris) Leave granted to file petition for writ of mandamus, Further ordered petition denied. Order dated Aug. 17.
Aug. 25	12.	Motion for a rehearing, and Petitioner's Supporting Memorandum.
Aug. 26	13.	Order denying motion for rehearing.
		Copy to petitioner, respondent and US Attorney.
Sept. 16	14.	Notice of Appeal. Copy mailed clerk CCA.

Certified from the record, Sept. 21, 1966,
T. H. Campion, Clerk, per R. P. Bower, Deputy Clerk.

[SEAL]

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

No. 756 HC

JAMES F. O'CALLAHAN, PETITIONER

v.

WARDEN, United States Penitentiary,
Lewisburg, Pennsylvania

DEPARTMENT OF THE ARMY, United States Army,
Washington, D. C., RESPONDENTS

PETITION FOR A WRIT OF HABEAS CORPUS—
Dated March 28, 1966 and Filed April 7, 1966

Respectfully represents your petitioner, James F. O'Callahan, *pro se*, as follows:

I

The petitioner resides in the United States Penitentiary, Lewisburg, Pennsylvania within the judicial district of this court.

II

The respondents are the WARDEN, United States Penitentiary, Lewisburg, Pennsylvania and the said institution and official is located within the judicial district of this court, as Warden, he is responsible for the custody and control of all prisoners in said institution and governs and manages them pursuant to their respective sentences have been performed, or until they are otherwise discharged in due course of law; and, the DEPARTMENT OF THE ARMY, United States Army, Washington, D. C. whose military courts-martial sentence to confinement for ten years rendered by General Courts-Martial #393590 on October 11, 1956 at Fort Shafter, Oahu, Territory of Hawaii is the authority by which the respondent, WARDEN, United States Penitentiary, Lewisburg, Pennsylvania holds your petitioner in physical confinement.

III

On October 11, 1956 petitioner was put to trial by a General Courts-Martial at Fort Shafter, Oahu, Territory of Hawaii for civil substantive crimes of Assault with intent to rape; Housebreaking with intent to commit rape; and, Attempted rape in violation of Sections 880, 930, and 934, Title 10, United States Code. The aforesaid criminal acts were charged to have been committed by your petitioner on or about July 20, 1956 at the Reef Hotel, Waikiki Beach, Honolulu, Oahu, Territory of Hawaii. On October 11, 1956 the General Courts-Martial returned a verdict of guilty to all charges and specifications and petitioner was on October 11, 1956 sentenced to be dishonorable discharged, to forfeit all pay due and to become due and, to be confined at hard labor for ten years. Petitioner is presently incarcerated pursuant to said sentence and, is unlawfully restrained and confined for the reasons set forth below.

IV

Petitioner has exhausted all available military remedies. On March 1, 1957 the United States Court of Military Appeals entered an order affirming petitioner's conviction and sentence; and, any further proceedings judicially or administrative, if otherwise available, would be to no avail for the military courts and authorities are so biased and prejudiced against petitioner that he will be denied relief in any event.

V

Petitioner is unable to produce the transcript, exhibits, documents, and records arising from his trial and appeal because he does not have possession of or access to the same; but, he asserts that such transcript, exhibits, documents and records are available, for they are presently within the care, custody, and control of the respondent, DEPARTMENT OF THE ARMY, United States Army, Washington, D.C. Petitioner's attack upon the unlawful nature of his restraint relates to each and every one of the proceedings which have heretofore been held in the military courts and a full consideration of the issues here-

in raised requires the examination of substantially all of the aforesaid records.

VI

The respondent, DEPARTMENT OF THE ARMY, United States Army, Washington, D.C. violated petitioner's Federal Constitutional Rights to a fair and impartial trial and more specifically those Federal Constitutional Rights guaranteed to him by Article III and Amendment VI, United States Constitution which relates to trial by jury in the following manner:

Petitioner was on or about the evening of July 20, 1956 arrested by two uniformed police officers of the Honolulu, Hawaii, Police Department at Waikiki Beach on suspicion of having broken into an apartment dwelling in the Reef Hotel and assaulting its occupant. Petitioner was transported in handcuffs from the point of arrest on Waikiki Beach to the Reef Hotel by the Honolulu Police Officers to the apartment dwelling in question in the Reef Hotel for purposes of establishing identification. Petitioner was subsequently transported in custody from the Reef Hotel to the Honolulu Police Station and was booked on charges unknown to petitioner. Petitioner was held in confinement at the Honolulu Police Station that evening and was subjected to extensive questioning by relays of uniformed police officers concerning the break and assault at the Reef Hotel; and, Petitioner denied all knowledge of said crimes and loudly proclaimed his innocence. The following morning after the normal day shift of the Detective Division of the Police Department reported for work, Petitioner was again handcuffed and transported to the Detective Division Headquarters for further questioning by detective officers. At some unknown time on the second day of custody petitioner was surrendered by the civil police to the Hawaiian Armed Services Police because petitioner was a Sergeant in the United States Army.

Upon being taken into custody by the Hawaiian Armed Services Police petitioner was transported, in handcuffs, under arrest, to the Hawaiian Armed Services Police Station on Ala Moana Blvd., Honolulu, Hawaii and again questioned about the break and assault charge. Petitioner

was again subsequently handcuffed and transported to the Headquarters, Criminal Investigation Division, United States Army, Pacific, located at Fort Shafter, Oahu, Hawaii and again subjected to questioning by these agents. During this latest period of questioning Petitioner was informed by these agents that as a career man (awaiting a commission) I should know that the military couldn't prosecute me for whatever happened in Honolulu and that in the meantime I was putting a lot of heat on them (the military) because I had gotten arrested by the civil police. They went on to state that due to the influence of the hotel people and money elements behind the scenes I should give them a confession so as to eliminate all the trouble and it could then die down. Additionally, should the civil police decide to come and get me again for these crimes then, the military would be in a position to adequately protect me. After being assured by them that this would not result in any military charges against me nor would it effect my career or commission I then gave them a confession to "take the heat off and protect the army."

After receiving the confession Petitioner was again transported in handcuffs to the Post Stockade, Schofield Barracks, Oahu, Hawaii and ordered held in confinement "incommunicado" . . . no visits from anyone. Some days later Petitioner was served with court-martial charges charging the so called Honolulu offenses and then assigned counsel to defend him.

VII

Article III, Section 2 of the Constitution of the United States provides that "The trial of all crimes, except in cases of impeachment, shall be by jury." The V Amendment provides that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." The VI Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ." The exception for cases arising in the land and naval forces, though appearing only in the V Amendment, has been deemed to apply

by implication to the right to petit jury trial granted by the Sixth Amendment. *Ex parte Milligan*, 4 Wallace (18 U.S.) 2, 123, 138-139 (1866) *Ex parte Quirin*, 317 U.S. 1, 40, but there has been no decision of the question here presented, of whether an offense committed while the perpetrator is off-base and off-duty, having no relation to the military other than what he was at the time, a member thereof, is a case "arising in the land and naval forces" or is otherwise excepted from the guarantee of jury trial.

The key to the solution appears to have been given by the Supreme Court in *Ex parte Quirin*, 317 U.S. 1 (1942). The Fifth and Sixth Amendments "did not enlarge the right to jury trial as established by this Article," but only guaranteed "the continuance of certain incidents of trial by jury which (it) had left unmentioned." Page 39 of 317 U.S.

Prior to the adoption of the Constitution, soldiers were tried by jury at common law when accused of non-military, off base offenses. Quirin held that the object of Section 2 Article III was to "preserve, unimpaired, trial by jury in all those cases in which it had been recognized by the common law." Page 39 of 317 U.S. If the above construction of the exception in the Fifth Amendment is correct, then they have that right today. The conclusion can only be a member of the armed forces who commits a civil crime while off duty and away from his base may not constitutionally be tried for the substantive crime by a court-martial.[1]

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[1] For a more detail analysis and study see appended hereto—Extract from the testimony of A. Kenneth Pye, Assoc. Dean & Professor of Law given to the Committee On The Judiciary, U.S. Senate, 87th Congress, 2nd Sess. on Constitutional Rights Of Military Personnel recorded on pp. 571-72 of the Committee's report; Vand. Law Review: The Constitution and the Standing Army: Another problem of Courts-martial Jurisdiction; Harv. Law Review: Courts-Martial & The Bill of Rights, The Original Understanding; and The Original Practice II; Memo of Understanding Between the Departments of Defense and Justice respecting civil substantive crimes; Ex parte [illegible]ey, 82 F. Supp. 743; Extract Charles v. U.S. Territorial Gov[illegible]ment; Captain Klein U.S.D.C., N.D., Calif. July 27, 1964.

VIII

The respondent, DEPARTMENT OF THE ARMY, United States Army, Washington, D.C. violated petitioner's Federal Constitutional Rights prohibiting self incrimination and more specifically those Federal Constitutional Rights guaranteed to him by Article III and Amendment V, United States Constitution which relates to no person being compelled to be a witness against himself in the following manner:

Petitioner was initially arrested by civil police and from that point on he was questioned continually by civil and military police for approximately twenty-four hours without sleep or rest and, petitioner was not only the prime suspect but, was in fact the only suspect and the entire extra-judicial proceedings carried on at the civil Honolulu Police Station, the Hawaiian Armed Services Police Station, and the Criminal Investigator's Headquarters at Fort Shafter was designed primarily from allowing petitioner to contact his friends, relatives, or friends and to get him to confess and thereby incriminate himself. The teachings of *Escobedo* v. *Illinois* 378 U.S. 478 is broad enough to encompass a member of the armed forces who is being detained in a military police station solely for the purpose of gaining incriminating evidence, (confession) and Petitioner was not free to live by virtue of his being a prisoner. It can certainly be said with accuracy that Petitioner was the accused at this point in the proceedings and his further detention was solely for the purpose of forcing him to incriminate himself; this is equally evidenced by the unlawful coercion used (mental) on petitioner to protect "the army" . . . "the army protects it's own". The introduction of the confession at Petitioner's trial was prejudicial error of the greatest magnitude without anyone even inquiring into the circumstances surrounding it's giving.

IX

The respondent, DEPARTMENT OF THE ARMY, United States Army, Washington, D.C. violated petitioner's Federal Constitutional Rights to a fair and impartial

trial and more specifically those Federal Constitutional Rights guaranteed to him by Amendment VI United States Constitution which relates to be confronted by his accuser and see and hear the testimony of the witnesses face to face.

The respondent in lieu of presenting the alleged victim of these crimes decided to make use of depositions and, in accordance with the procedure of Article 49, U.C.M.J. (10 U.S.C. 849) did not inform petitioner that depositions would be used; that depositions would be taken; the time and place for taking said depositions; the despondent whose testimony would be taken by deposition; or any other information that was required by article 49 of the code. However, even absent this jurisdictional error was the fact that petitioner did not consent, and indeed at trial objected to the use of depositions in lieu of the victim of these crimes. The Sixth Amendment of the Constitution and the teachings of *Pointer* v. *Texas*, —— U.S. —— (April 5, 1965) prohibit the use of depositions in prosecution for capital or infamous crimes absent the consent of the accused being tried; the F.R.Crim.P. 41 prohibits the government itself from using depositions but only the accused. Surely the Constitution is broad enough to prohibit there use in a military trial absent necessity rather then in the present case merely for convenience. If depositions were to be used the government should have taken the depositions of the witnesses in Hawaii where Petitioner and his counsel could have been present and, then transferred the trial to California where the absent witnesses could have appeared. The use of depositions in the circumstances of the case was such a misuse of discretionary authority that it constituted jurisdictional error of the greatest magnitude.

X

The respondent, DEPARTMENT OF THE ARMY, United States Army, Washington, D. C. violated petitioner's Federal Constitutional Rights to a fair and impartial trial and more specifically those Federal Constitutional Rights guaranteed to him by the VI Amendment which relates to the assistance of counsel in the following manner:

Having elected to make use of depositions of the absent witnesses in petitioner's trial, the respondent maintains that they appointed two "disinterested persons" to act for the government and defendant in the taking of the absent witnesses depositions. This is certainly not the "assistance of counsel" guaranteed by the VI Amendment and as taught in *Gideon* v. *Wainwright* 372 U.S. 335. Petitioner never knew of the assignment of these "disinterested parties"; petitioner was never afforded a means of communication, written or oral, with this mysterious person; was this person an attorney; even though it may have been an attorney, can it be reasonably said that this is adequate representation. The least that would have been required under the circumstances was for the government to have provided for defendant's counsel of his own choosing whou (sic) would then defend him at trial to be present at the taking of the depositions of the most important witness of all . . . the victim. This was and is the only witness outside of petitioner who could actually testify first hand as to what actually happened at the Reef Hotel. Mere perfunctionally appearance of counsel, no matter how competent, is not sufficient to hold this as adequate representation. Petitioner was under the circumstances of the case effectively deprived of the assistance of counsel at the most crucial part of the entire proceedings . . . the cross-examination of the victim of the crime. This was and is prejudicial and jurisdictional error of the greatest magnitude and by itself should be sufficient for awarding the writ.

XI

The respondent, DEPARTMENT OF THE ARMY, United States Army, Washington, D. C. violated petitioner's Federal Constitutional Rights to a fair and impartial trial and more specifically those Federal Constitutional Rights guaranteed to him by Article III and Amendment V which relates to "jury" and due process of law in the following manner:

Petitioner was found guity of infamous crimes by a ⅔rds majority rather than a unanimous vote of the courts-martial which tried him. Surely even absent

everything else, a courts-martial, which replaces the jury, must vote like a jury . . . a unanimous vote for guilt. Anything else eliminates the concept of "reasonable doubt" and the "presumption of innocence". A less than unanimous vote is not binding and therefore jurisdictional error. Congress may not make any laws for the government and regulation of the land and naval forces absent that which is "necessary and proper".

WHEREFORE, Petitioner prays as follows:

1. That an order of notice be issued directing the respondents to show cause whay the writ should not be granted;
2. That a writ be granted directing respondents to produce petitioner at all hearings held by this court;
3. That after a hearing on the merits, a writ be issued directing that petitioner be discharged from further custody;
4. That the conviction and sentence of the military courts-martial be declared null and void in their entirety and petitioner be released forthwith;

Respectfully submitted

/s/ James F. O'Callahan
JAMES F. O'CALLAHAN,
Petitioner, pro se
Box PMB 1,000
Lewisburg, Pennsylvania 17837

Before me, a Parole Officer, personally appeared the above, James F. O'Callahan, who, being by me first duly sworn, says that the facts and allegations in the above petition are true as he verily believes.

JAMES F. O'CALLAHAN

Sworn and subscribed to before me in my presence this 28 day of March in the year of Our Lord 1966.

/s/ (Illegible)
Parole Officer
United States Penitentiary
Lewisburg, Pennsylvania

Parole Officer - Authorized by Act of July 7, 1955 to administer oaths (18 U.S.C. 4804).

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Habeas Corpus No. 756

UNITED STATES OF AMERICA EX REL.
JAMES F. O'CALLAHAN, PETITIONER

v.

JACOB J. PARKER, Warden, United States Penitentiary, Lewisburg, Pennsylvania, and The DEPARTMENT OF THE ARMY, United States Army, Washington, D.C., RESPONDENTS

RESPONDENT'S RETURN TO RULE TO SHOW CAUSE AND ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS—
Filed May 5, 1966

Comes now the respondent, Jacob J. Parker, Warden, United States Penitentiary, Lewisburg, Pennsylvania, on whom has been served a petition for a writ of habeas corpus and a rule to show cause why such writ should not be granted, and by his attorneys makes a return to the said rule and an answer to the said petition and respectfully shows to the court that he holds the said James F. O'Callahan by authority of the United States as a prisoner pursuant to the sentence of a general court-martial under the following circumstances:

I

That the said James F. O'Callahan, while serving on active duty in the United States Army, assigned to Field Station (8605), Fort Shafter, Territory of Hawaii, in the grade of Sergeant with Army Service Number RA 11221278, was duly convicted on 11 October 1956, at Fort Shafter, Hawaii, by a general court-martial convened by the commanding general, United States Army, Pacific, of the following offenses (charges attached hereto as Respondent's Exhibit A):

a. Assault with intent to rape Miss Michaela Scholes, on 21 July 1956, in violation of Article 134, Uniform

Code of Military Justice (UCMJ) (Charges I and its specification; 10 U.S.C. 934).[1]

b. Attempt to rape Miss Michaela Scholes, on 21 July 1956, in violation of Article 80, UCMJ (Charge II and its specification; 10 U.S.C. 880).

c. Housebreaking, on 21 July 1956, by entering the apartment of Mr. Fenton Scholes with intent to commit a criminal offense therein, to wit, rape, in violation of Article 130, UCMJ (Charge III and its specification; 10 U.S.C. 930).

II

During the court-martial, the petitioner was represented by a qualified military lawyer, 1st Lieutenant Bradford W. Mitchell, a member of the Judge Advocate General's Corps and certified in accordance with Article 27(b), UCMJ (10 U.S.C. 827(b)). This officer also represented the petitioner during the formal pretrial investigation of the court-martial charges, from 27 to 30 July 1956, held pursuant to Article 32, UCMJ (10 U.S.C. 832). In connection with trial of the charges, Lieutenant Mitchell was appointed, on 2 August 1956, to defend the petitioner.

III

The court-martial sentenced the petitioner to be dishonorably discharged from the service, to forfeit all pay and allowances, and to be confined at hard labor for ten years.

IV

Under the provisions of Article 61, UCMJ (10 U.S.C. 861), the convening authority referred the record of trial (Respondent's Exhibit B) to his staff judge advocate for review. After a thorough review of the record of trial (attached hereto as Respondent's Exhibit C), the staff

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[1] The Uniform Code of Military Justice was enacted by the act of 5 May 1950, Public Law 506, 81st Congress, ch. 169, sec. 1, 64 Stat. 108; title 50, U.S.C., sec. 551-736 (1952 ed.). The Uniform Code of Military Justice was codified and reenacted into law without any change by Public Law 1028, 84th Congress, ch. 1041, 10 August 1956, 70A Stat. 36-78; 10 U.S.C. 801-940 (1958 ed.).

judge advocate submitted his written opinion thereon to the convening authority. The staff judge advocate found the findings of guilty, as to all the charges and specifications thereof, correct in law and fact, and recommended that the sentence as adjudged by the court-martial be approved.

V

On 6 November 1956, the convening authority took action upon the case under the provisions of Article 64, UCMJ (10 U.S.C. 864). He approved the findings of guilty and the sentence, and forwarded the record of trial, as required by Article 65(a), UCMJ (10 U.S.C. 865(a)); to The Judge Advocate General of the Army for review by a Board of Review. The charges, specifications, pleas, findings and sentence of the court-martial, and the approving action of the convening authority are set forth in General Court-Martial Order Number 18, Headquarters United States Army, Pacific, APO 958, San Francisco, California, dated 6 November 1956, which promulgates the results of trial and is attached hereto as Respondent's Exhibit D.

VI

The Board of Review in the Office of The Judge Advocate General of the Army reviewed the record of trial as required by the provisions of Article 66, UCMJ (10 U.S.C. 866). Pursuant to the petitioner's request (attached hereto as Respondent's Exhibit E), the petitioner was represented in all proceedings before the Board of Review by a qualified military lawyer designated by The Judge Advocate General under the provisions of Article 70(a) and (c)(1), UCMJ (10 U.S.C. 870(a) and (c)(1)). The petitioner's counsel submitted an assignment of errors (attached hereto as Respondent's Exhibit F), but waived oral argument thereon before the Board of Review. On 4 January 1957, the Board of Review found the findings of guilty and sentence correct in law and fact and affirmed them.

VII

On 14 January 1957, the petitioner filed a petition in the United States Court of Military Appeals for a grant of review pursuant to Article 67, UCMJ (10 U.S.C. 867). On 1 March 1957, the United States Court of Military Appeals denied this petition.

VIII

Thus, final military appellate review having been completed and the provisions of Article 71(c), UCMJ (10 U.S.C. 871(c)), having been complied with, the sentence was ordered into execution on 21 March 1957. A United States penitentiary, reformatory, or other such institution was designated as the place of confinement. A copy of General Court-Martial Order Number 168, Headquarters 5th Infantry Division, Fort Ord, California, dated 21 March 1957, promulgating the results of the final approving action and the order of execution of the sentence is attached as Respondent's Exhibit G.

IX

On 5 March 1958, the petitioner was transferred to the United States Penitentiary at Lewisburg, Pennsylvania. Per order of the United States Board of Parole, the petitioner was, on 6 May 1960, released from confinement and placed on parole. On 5 April 1962, while still on parole, the petitioner was convicted on his plea of guilty of a charge of rape in the Middlesex Superior Court, Commonwealth of Massachusetts, and sentenced by a Justice thereof to a term of 5 to 8 years. On 21 February 1966, the petitioner was released to the Federal authorities and reconfined, on 5 March 1966, in the United States Penitentiary at Lewisburg as a parole violator, pursuant to 18 U.S.C. 4205 (1964 ed.), to serve the remainder of his military sentence. The petitioner's full term, less 180 days, expires 28 January 1972; with statutory good time it should expire on 16 June 1970. Attached hereto as Respondent's Exhibits H, I, and J are, respectively, the Sentence Data Record of the Bureau of Prisons, dated 9 March 1966, Referral for Consideration of

Alleged Violation, dated 13 March 1962, and the Parole Violator Warrant, dated 13 March 1962, with Deputy U. S. Marshal's Return.

X

Answering the allegations in the petition for a writ of habeas corpus, the respondent admits the allegations contained in the petition which are consistent with the facts stated in this return and denies the remaining allegations in the petition.

XI

Further answering, the respondent avers:

a. That the petitioner was serving as a soldier in the United States Army, in the grade of Sergeant, at the time he committed the offenses on 21 July 1956 and at the time of trial by general court-martial on 11 October 1956. He was, therefore, subject to the jurisdiction of the United States Army.

b. That the general court-martial which tried the petitioner was properly constituted, had jurisdiction over the petitioner and of the offenses charged against him, and that the sentence adjudged against the petitioner by the court-martial was within legal limits and within the power of the court-martial to adjudge.

c. That the fact that the offenses were committed off a military reservation and during a period when the petitioner was not required to perform any official military duties, did not in any way affect the jurisdiction of the court-martial over the person of the petitioner or over the offenses.

d. That, as the petitioner was a soldier in the United States Army at the time of the offenses and at the time of his trial by court-martial, he was not entitled to a trial by jury or to a unanimous guilty verdict.

e. That the petitioner was not illegally coerced into making a pretrial confession. The record of trial of the petitioner's case and the subsequent appellate procedures on his behalf are completely devoid of any matter to substantiate any such contentions. Prior to making his pre-

trial statement, the petitioner was properly warned of his rights by the military criminal investigator as required by Article 31, UCMJ (10 U.S.C. 831). That fact is also established by the petitioner's affirmative acknowledgment in the pretrial written statement that he was informed of the nature of the accusations and of his rights under Article 31 and that the statement is of his free will, without threat of punishment, coercion, unlawful influence or inducement.

f. That the Interrogatories and Depositions (Prosecution Exhibits 1, 2, 3, and 4) were caused to be taken, and in fact taken, after the charges against the petitioner had been signed and after these charges had been referred for trial. That the then trial counsel, Captain Shelton R. Nelson, had submitted the written interrogatories to the petitioner's counsel and gave him ample opportunity to propound cross-interrogatories; that counsel declined to propound cross-interrogatories and objected to the taking of the depositions. That at the time of trial the witnesses who testified by the depositions in question resided beyond the Territory of Hawaii and more than 100 miles from the place of trial. Accordingly, the depositions were properly admitted into evidence and considered by the court-martial.

g. That the petitioner is properly confined in accordance with the law applicable to his case.

WHEREFORE, for the reasons hereinbefore set forth the respondent respectfully prays the court to discharge the rule to show cause and to dismiss the petition for the said writ of habeas corpus.

BERNARD J. BROWN
United States Attorney

/s/ Harry A. Nagle, Jr.
Assistant United States Attorney

/s/ Abraham Nemrow
Lieutenant Colonel, JAGC
Office of The Judge Advocate General
Department of the Army
Washington, D.C.

/s/ Bruce E. Stevenson
Major, JAGC
Office of The Judge Advocate General
Department of the Army
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Habeas Corpus No. 756

JAMES F. O'CALLAHAN, PETITIONER

vs.

WARDEN JACOB J. PARKER, United States Penitentiary, Lewisburg, Pennsylvania, and The DEPARTMENT OF THE ARMY, United States Army, Washington, D.C., RESPONDENTS

PETITIONER'S TRAVERSE TO RESPONDENTS' ANSWERS TO RULE TO SHOW CAUSE WHY WRIT SHOULD NOT BE GRANTED; AND MOTION FOR ASSIGNMENT OF COUNSEL —Dated May 13, 1966 and Filed May 19, 1966

Now comes James F. O'Callahan, Petitioner, *pro se*, and says:

Petitioner denies each and every allegation and answers of the respondents in their answers to rule to show cause.

Petitioner being a layman and acting *pro se* duly motions this honorable court for assignment of counsel in the above entitled cause of action now pending before this court. Petitioner verily believes that due to the voluminous papers and answers filed by the respondents and the questions of waiver of rights, constitutional retroactivity of legal decisions, trial objections not specifically stating the word "confrontation", government appellate review, etc., petitioner is not able to adequately and intelligently express his answers in writing in this traverse and the guiding hand of competent counsel is of paramount importance to insure a fair and just hearing in the cause of action pending.

WHEREFORE, petitioner duly prays for the granting of his motion for counsel or in the alternative that this court hold a swift and speedy hearing and during oral arguments by petitioner the court question petitioner for any points of clarification needed.

Respectfully submitted

/s/ James F. O'Callahan
JAMES F. O'CALLAHAN
Petitioner, pro se
Box PMB 1,000
Lewisburg, Pennsylvania

[Certificate of Service (omitted in printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Habeas Corpus No. 756

UNITED STATES OF AMERICA EX REL.
JAMES F. O'CALLAHAN, PETITIONER

vs.

JACOB J. PARKER, Warden, United States Penitentiary, Lewisburg, Pennsylvania, and The DEPARTMENT OF THE ARMY, United States Army, Washington, D.C., RESPONDENTS

APPEARANCES:

For the Petitioner—Pro Se

For the Respondents—BERNARD J. BROWN, United States Attorney; HARRY A. NAGLE, JR., Assistant United States Attorney; ABRAHAM NEMROW, Lieutenant Colonel, JAGC, Office of The Judge Advocate General Department of the Army, Washington, D.C.; BRUCE E. STEVENSON, Major, JAGC, Office of The Judge Advocate General, Department of the Army, Washington, D.C.

* * * * *

MEMORANDUM—Dated & Filed August 12, 1966

James F. O'Callahan, a prisoner at the United States Penitentiary, Lewisburg, Pennsylvania, has filed a petition for a writ of habeas corpus in this Court. On October 11, 1956, O'Callahan was convicted of assault with intent to commit rape, attempted rape, and housebreaking with intent to commit rape, in violation of 10 U.S.C. §§ 934, 880, 930, by a general court-martial at Fort Shafter, Hawaii. O'Callahan was then serving on active duty in the United States Army, although the offenses were committed while he was off duty and off base.

The allegations in the complaint are as follows: The acts for which O'Callahan was convicted occurred on July 20, 1956, in the Reef Hotel. He was arrested that night

by the Honolulu Police Department, and was interrogated by them until he was turned over to the Hawaiian Armed Services Police who also questioned him. He was subsequently turned over to the United States Army. The Army investigators allegedly told O'Callahan that if he gave a confession it would not result in any military charges and it would not affect his career. O'Callahan confessed and was subsequently served with the charges against him and was assigned counsel.

O'Callahan was subsequently tried and convicted by a general court-martial by a two-thirds vote. At the trial, the confession was introduced. Interrogatories of the victim were introduced over objection. The interrogatories were taken in accordance with 10 U.S.C. § 849, and the victim, herself, never testified at the trial.

O'Callahan contends that his custody is unlawful on the following grounds: (1) That the court-martial had no jurisdiction, because the alleged acts were committed off-base while he was off-duty, under Article III, Section 2 and the Fifth and Sixth Amendments to the United States Constitution; (2) That his confession was coerced; (3) That depositions of the victim and certain other witnesses were improperly introduced into evidence and (4) That he was denied his right to trial by jury and his right to a unanimous guilty verdict under Article III and the Fifth Amendment to the United States Constitution.

In this case, a Rule to Show Cause issued, the Respondents filed an Answer and a supporting Memorandum, and Petitioner filed a Traverse and a motion for assignment of counsel. The Respondents filed with their Answer certified copies of certain sentence and parole records, the Record of Trial, and certain other documents relating to the court-martial. In their Answer, Respondents made a motion to dismiss the petition and it is this motion which is before this Court at this time.

The scope of review of military cases on habeas corpus was succintly stated in Palomera v. Taylor, 344 F.2d 937, 938-939 (10th Cir. 1965), as follows:

> "While the civil courts are authorized to review a military conviction on habeas corpus, that review has generally been limited to determine whether the

court-martial had jurisdiction of the person accused and the offense charged and whether it acted within its lawful powers. Hiatt v. Brown, 339 U.S. 103, 70 S.Ct. 495, 94 L.Ed. 691 (1950). This review has also been held to include an examination of the accused's Constitutional rights but only to see that the military courts have given due consideration to the guarantees afforded by the Constitution. Burns v. Wilson, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953); Easley v. Hunter, 209 F.2d 483 (10th Cir., 1953); Suttles v. Davis, 215 F.2d 760 (10th Cir., 1954)."

The first issue is whether the court-martial had jurisdiction over petitioner. O'Callahan raised this same ground in a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts. O'Callahan v. Chief U.S. Marshall and Dept. of Army, Misc.Civil 66-8-W (1966). In his opinion, dated February 23, 1966, Chief Judge Wyzanski held that there was no merit in the petitioner's position and that the court-martial had jurisdiction over the petitioner. The petition for writ of habeas corpus was denied. This issue and the grounds asserted are the same here, and any further inquiry will not serve the ends of justice. Thus, under 28 U.S.C. § 2244, this Court will not entertain the petition on this issue. United States ex rel. Richter v. Rundle, 227 F.Supp. 847 (E.D.Pa. 1964).

The second allegation is that the confession was coerced. In his petition, O'Callahan cites the Escobedo case. However, both the rules of the Escobedo and the Miranda cases have been declared to be of prospective application only. Johnson v. State of New Jersey, 34 L.W. 4592 (1966). The Record of Trial shows that O'Callahan and his counsel were advised of the right to testify and contest the voluntariness of the confession. Petitioner indicated that he understood his rights and when the statement and a drawing were offered into evidence, no objection was made. (Record of Trial, pp. 41, 42). This was a clear election not to contest the voluntariness of the confession and the drawing. This issue was not raised in

his military appeals either. The allegation is without merit since the due process requirements have been satisfied. Swisher v. United States, 354 F.2d 472, 476 (8th Cir. 1966).

The third allegation is that certain depositions were improperly introduced into evidence at the trial. Keeping in mind the scope of review, this Court will consider whether the military courts gave due consideration to O'Callahan's constitutional rights.

At the trial, the prosecution offered into evidence written interrogatories of the victim and three other witnesses who were then in the continental United States. (Record of Trial, pp. 17, 18). They were admitted into evidence over the objections of O'Callahan's counsel. When O'Callahan's counsel first objected, he stated that there was no showing that the witness was unavailable nor that it was unreasonable to have the witness present and that the accused had a right to be confronted by the witnesses against him. (Record of Trial, p. 17). The subsequent argument stressed the lack of showing of the unavailability and unreasonableness factors. (Record of Trial, pp. 18-21). However, it cannot be said that the confrontation objection was dropped.[1] The record further indicates that the defendant was offered the right to submit cross-interrogatories, but objected to the procedure on the same ground as raised at trial. (Record of Trial, p. 19).

In United States v. Jacoby, 29 C.M.R. 244 (1960), the Court of Military Appeals overruled United States v. Sutton, 11 C.M.R. 220, and United States v. Parrish, 22 C.M.R. 127, holding that under the Sixth Amendment an accused must be afforded the opportunity to be present with counsel at the taking of written depositions. In Jacoby, accused's counsel objected to the taking of depositions upon written interrogatories on the basis that the accused would be denied her right to confrontation of the witnesses against her and made the same objection at trial. Both objections were overruled at the trial. On

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[1] On page 19 of the Record of Trial, O'Callahan's counsel cited U.S. v. Valli, 21 C.M.R. 186 (1956), stating th t he relied on the language therein. The right of confrontation is discussed therein.

appeal, the Court of Military Appeals reversed the conviction. Three weeks later, in United States v. Lawrence, 29 C.M.R. 320 (1960), the Court of Military Appeals reversed a similar case involving written interrogatories that were objected to as denying the right of confrontation, citing the Jacoby case. Also See United States v. Weinstein, 29 C.M.R. 415 (1960).

However, it cannot be said that the objections raised by O'Callahan's counsel were not considered by the military courts. Under the circumstances, it appears that the objections were given due consideration and our review will go no further. Swisher v. United States, 237 F.Supp. 921, 924-929 (W.D.Mo. 1965); affirmed in 354 F.2d 472 (8th Cir. 1966). It appears from the record that the military has given fair consideration to the petitioner's claim, thus it is not the federal court's function to grant the writ to re-evaluate the evidence. Sunday v. Madigan, 301 F.2d 871, 873 (9th Cir. 1962).

The final claim by O'Callahan is that he was convicted by a two-thirds vote rather than by unanimity and that he did not have a jury trial in violation of his constitutional rights. In Whelchel v. McDonald, 340 U.S. 122, 127 (1950), it is stated that: "The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions." Petitioner was in the United States Army at the time of the trial and he was not entitled to either a unanimous guilty verdict nor a trial by jury. There are no deprivations of any constitutional rights in this regard.

Accordingly, the petition for writ of habeas corpus will be dismissed and the motion of the Respondents will be granted.

/s/ Frederick V. Follmer
United States District Judge

August 12, 1966.

ORDER

NOW, August 12, 1966, in accordance with Memorandum filed this day, It is hereby Ordered that the motion of the Respondents, Jacob J. Parker and The Department of the Army, to dismiss the petition of James F. O'Callahan for writ of habeas corpus is granted, that the petition for writ of habeas corpus is dismissed, and that the motion for assignment of counsel is denied.

/s/ Frederick V. Follmer
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16210 and 16211

JAMES F. O'CALLAHAN, APPELLANT

v.

J. J. PARKER, WARDEN, UNITED STATES PENITENTIARY, LEWISBURG PENNSYLVANIA, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Submitted January 17, 1967

Before: HASTIE, GANEY and SEITZ, *Circuit Judges.*

OPINION OF THE COURT—Filed February 2, 1967

PER CURIAM:

The issues which we are asked to decide on this appeal from a denial of habeas corpus are now before the United States Court of Military Appeals on a "motion for rehearing" filed in that court by the present appellant on December 6, 1966, and the Court of Military Appeals has directed that the matter be briefed and argued. In this posture of the matter any intervention by the civil courts would be untimely.

Accordingly, the district court's denial of habeas corpus will be affirmed.

A True Copy:

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,211

UNITED STATES OF AMERICA EX REL.
JAMES F. O'CALLAHAN, APPELLANT

vs.

J. J. PARKER Warden, United States Penitentiary, Lewisburg, Pennsylvania and the DEPARTMENT OF THE ARMY, United States Army, Washington, D. C.

(D. C. Habeas Corpus No. 756)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: HASTIE, GANEY and SEITZ, *Circuit Judges.*

JUDGMENT—Dated and Filed February 2, 1967

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 12, 1966, be, and the same is hereby affirmed.

ATTEST:

/s/ Thomas F. Quinn
Clerk

February 2, 1967

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16210 and 16211

UNITED STATES OF AMERICA EX REL.
JAMES F. O'CALLAHAN, APPELLANT

v.

J. J. PARKER, WARDEN, UNITED STATES PENITENTIARY,
LEWISBURG, PENNSYLVANIA

AND THE

DEPARTMENT OF THE ARMY, UNITED STATES ARMY,
WASHINGTON, D. C.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Reargued January 11, 1968

Before: HASTIE, *Chief Judge;* and GANEY and
SEITZ, *Circuit Judges.*

OPINION OF THE COURT—Dated and Filed March 8, 1968

By HASTIE, *Chief Judge.*

The petitioner in this habeas corpus proceeding was a soldier in the United States Army when a court-martial convicted him of the crimes of housebreaking and assault with intent to commit rape and imposed a ten year sentence which he is now serving.

After his sentence had become final he attacked it collaterally by petition in the nature of error coram nobis in the United States Court of Military Appeals. That court accepted the petition as within its jurisdiction, considered the allegations on their merits and denied relief.

United States v. *O'Callahan*, 1967, 16 U. S. M. A. 568, 37 C. M. R. 188.

The present petition for habeas corpus was filed in the District Court for the Middle District of Pennsylvania, the district within which the prisoner is now confined. Denial of the petition was followed by this appeal.

Upon first argument we declined to consider the merits of the appeal because a petition for reconsideration of certain relevant issues was pending before the Court of Military Appeals. However, after that court denied the requested reconsideration, we agreed to consider and decide the merits of the appeal and we now do so.

Before the Court of Military Appeals the prisoner urged that his conviction had been obtained through violation of his Sixth Amendment right to confrontation of the witnesses against him. He has reasserted that contention in the present proceeding.

For many years courts-martial permitted the prosecution to introduce into evidence sworn answers which absent and not conveniently available witness had given to written interrogatories. Article 49, Uniform Code of Military Justice, 10 U. S. C. 849. The defense was permitted to have cross-interrogatories submitted to and answered by such witnesses along with the prosecution's questions. However, no provision was made in this case for depositions taken by way of direct and cross-examination by opposing counsel.

The alleged assault which gave rise to this prosecution occurred in a hotel room in Hawaii. The alleged victim, a fourteen year old girl, was a tourist from California. Three New Yorkers, also hotel guests, were among the witnesses. The testimony of these four persons was obtained in the form of sworn answers to interrogatories given after they had returned home. Defense counsel, advised of the contemplated interrogatories and his right to submit cross-interrogatories, objected to that procedure and asked for the right to cross-examine the witnesses. This request was denied and the defense then refused to submit cross-interrogatories. Subsequently, the answers of the four witnesses to interrogatories were read into evidence at the petitioner's trial over the objection of defense counsel.

In a subsequent and unrelated case, tried after the petitioner's conviction had become final, the Court of Military Appeals decided that its past rulings sanctioning the use of sworn answers to interrogatories as evidence in military trials had been mistaken and that the testimony of an absent witness must be taken by deposition with attendant opportunity afforded defense counsel to cross-examine the deponent. *United States* v. *Jacoby*, 1960, 11 U. S. C. M. A. 428, 29 C. M. R. 244. Therefore, in his post conviction petition to the Court of Military Appeals, the petitioner sought to have his conviction set aside because he had been denied the right of confrontation which the court had subsequently recognized in the *Jacoby* case. The court refused to set aside the conviction on the ground that, apart from the answers to interrogatories, the evidence of guilt was overwhelming and undisputed and, therefore, the introduction of the additional incompetent evidence was merely cumulative and not prejudicial.

We have to decide, first, whether the record justifies the factual conclusion that the accused was not prejudiced and, second, whether the use of the evidence in question was such a deprivation of Constitutional right as requires redress by a federal civil court on habeas corpus, whatever may appear concerning prejudice or lack of prejudice.

At the petitioner's trial several witnesses testified in open court to essential elements of the alleged crimes. Charles Redden, a soldier who had been a friend and companion of the petitioner, testified that on the evening in question, after they had drunk several beers, he and the petitioner made their way to the balcony outside of the fourth story hotel room where the intrusion and assault allegedly occurred. Looking in they saw a girl in bed. The defendant suggested that they enter the room and that one of them should have intercourse with the girl while the other held her. Redden rejected the suggestion, warned the defendant that such conduct would be rape and left the scene. He returned to the car in which they had come to the hotel and waited a short time for the petitioner who did not return.

Herman Olivieri, the hotel security officer, testified that, informed of screams from upstairs he had gone outside the building and had seen the petitioner climbing down the exterior of the hotel from balcony to balcony. He gave chase and apprehended the defendant a short distance away. He testified that the petitioner was dressed in trousers and a T-shirt, that his belt was loose and his trousers open. He took the defendant to the room of the girl who allegedly had been assaulted and there observed injuries to the girl's face and arms which he described to the court. He also testified that the defendant admitted that a shirt found at the scene belonged to him and that he had entered the room and there had been a "scuffle" between him and the girl.

In addition, a confession made by the defendant to the military police was read into the record at the trial without objection after evidence of voluntariness. In this statement, the defendant admitted entering the hotel room and striking the girl and that his intent was rape. He also stated that he and Redden had drunk more beer than had been admitted by Redden. He described the girl as appearing to be about 18, although the victim's deposition showed her age to have been 14.

We turn now to the answers of the assaulted girl and the other hotel guests to interrogatories which were admitted over objection that the defendant had had no opportunity to confront or cross-examine the deponents. The girl's statement described her injuries more vividly than did the hotel security officer's testimony and added that her age was 14. She also confirmed the defendant's admission that he had said that he had a knife and would kill her if she should move. Otherwise she added nothing to the testimony given in open court.

The other deponents stated in their answers to interrogatories that they had heard screams and had seen a man climbing down the side of the building. They also described the girl's injuries.

The defense offered no testimony tending to disprove any essential element of the prosecution's case. Instead, after the court-martial had found the petitioner guilty as charged, the defense sought to show that the petitioner

had been a superior and well-behaved soldier and that this episode was an aberrant and irrational departure from his otherwise consistent good conduct. The court then sentenced the petitioner to a dishonorable discharge and to ten years at hard labor. A maximum sentence of twenty-five years would have been permissible.

Our study of the record satisfies us that the Court of Military Appeals was justified in its conclusion that the accused was not prejudiced by the answers of the absent witnesses to interrogatories. No rational trier of fact could have acquitted the accused in the light of the above outlined undisputed testimony of witnesses in open court and the confession of the accused. Thus, even if the use of the answers to interrogatories was inconsistent with the mandate of the Sixth Amendment,[1] the error was harmless in this case.

The Supreme Court has recently considered the significance of the absence of prejudicial consequence where error is of Constitutional dimension. *Chapman* v. *California*, 1967, 386 U. S. 18, applying the doctrine of *Fahy* v. *Connecticut*, 1963, 375 U. S. 85. In the *Chapman* case, the Court stated that when a conviction is attacked collaterally, the use of Constitutionally inadmissible evidence may be treated as harmless error, but only if the prosecution shall prove to the federal court "beyond reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U. S. at 24.

This rule was announced in a case involving a state conviction. Certainly, no stricter rule applies to the use of evidence by a military court. See *Burns* v. *Wilson*, 1953, 346 U. S. 137. Applying the *Chapman* doctrine here we find, as did the Court of Military Appeals, that beyond reasonable doubt the answers to interrogatories did not affect the verdict of guilty in this case. Moreover, the sentence indicates that the court gave substantial effect to the matter submitted on behalf of the petitioner

[1] For purposes of this appeal we assume that the use of the interrogatories was inconsistent with *Pointer* v. *Texas*, 1965, 380 U.S. 400, and that *Burns* v. *Wilson*, 1953, 346 U.S. 137, permits a federal civil court to reach the merits of this issue when a military conviction is attacked by habeas corpus.

in mitigation. Accordingly, the use of the answer to interrogatories as evidence, even if Constitutionally impermissible, did not constitute reversible error in the light of the entire record.

The petitioner also makes belated claims that he did not have effective assistance of counsel and that Constitutional requirements were not met in the obtaining of his confession. These contentions have not been urged before the Military Court of Appeals or any other military tribunal. Without suggesting that they have merit, we decide merely that they are not ripe for consideration by way of collateral attack in a civil court.

Finally, petitioner's counsel has ably briefed a detailed and well-documented argument to support the proposition that the military courts lack jurisdiction over such a crime as is charged in this case when the offense occurs, as it did here, while the accused soldier is on leave away from the military reservation. We considered and ruled against an indistinguishable claim of lack of military jurisdiction in *Thompson* v. *Willingham*, 1963, 318 F.2d 657. We adhere to that holding.

The judgment will be affirmed.

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,211

UNITED STATES OF AMERICA EX REL.
JAMES F. O'CALLAHAN, APPELLANT

vs.

J. J. PARKER, Warden, United States Penitentiary, Lewisburg, Pennsylvania and the DEPARTMENT OF THE ARMY, United States Army, Washington, D. C.

(D. C. Habeas Corpus No. 756)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: HASTIE, *Chief Judge*, and GANEY and SEITZ, *Circuit Judges*.

JUDGMENT—Dated and Filed March 8, 1968

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was reargued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 12, 1966, be, and the same is hereby affirmed.

March 8, 1968

* * * *

SUPREME COURT OF THE UNITED STATES

No. 202 Misc., October Term, 1968

JAMES F. O'CALLAHAN, PETITIONER

v.

J. J. PARKER, Warden

On petition for writ of Certiorari to the United States Court of Appeals for the Third Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 14, 1968

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to the first question presented by the petition which reads as follows:

"1. Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 et seq., have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?"

The case is transferred to the appellate docket as No. 646 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 646

JAMES F. O'CALLAHAN,

Petitioner,

against

J. J. PARKER, Warden, United States Penitentiary, Lewisburg, Pennsylvania,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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INDEX

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	6
Summary of Argument	7
ARGUMENT:	
POINT I—	
Congress Has No Constitutional Authority to Extend Court-Martial Jurisdiction to Conventional Crimes Committed in Peacetime by a Member of the Armed Forces Who Was Off-Duty and Off-Post	11
POINT II—	
Federal Jurisdiction May Not Extend to Substantive Civil Offenses But Is Confined Solely to Military Offenses or at Most the Military Aspect of Civil Offenses	28
Conclusion	31

TABLE OF CITATIONS

CASES:

Ashe v. *McNamara*, 355 F.2d 277 (1st Cir. 1965)	26
Bloom v. *Illinois*, 391 U.S. 194	24, 27
Burns v. *Wilson*, 346 U.S. 137	23

Page

Caldwell v. *Parker*, 252 U.S. 376 ..... 11, 13, 14, 21, 22
Callan v. *Wilson*, 127 U.S. 540 11
Coleman v. *Tennessee*, 97 U.S. 509 ..... 20, 21, 22
Connally v. *General Construction Co.*, 269 U.S. 385 26
Cummings v. *Missouri*, 4 Wall. 277 11

Duncan v. *Kahanamoku*, 327 U.S. 304 ..... 9, 27
Dynes v. *Hoover*, 61 U.S. 65 11

Grafton v. *United States*, 206 U.S. 333 ..... 27, 31
Grossman, Ex parte, 267 U.S. 87 11

Kennedy v. *Commandant*, 377 F.2d 339 (10th Cir. 1967) 26
Kinsella v. *Singleton*, 361 U.S. 234 ..... 23, 28

Lanzatta v. *New Jersey*, 306 U.S. 451 26
Lee v. *Madigan*, 358 U.S. 228 ..... 10, 11, 22
Lovell v. *Griffin*, 303 U.S. 444 24

Mason, Ex parte, 105 U.S. 696 ..... 11, 22, 25, 30
McElroy v. *Guagliardo*, 361 U.S. 281 23
Milligan, Ex parte, 4 Wall. (71 U.S.) 2 22

Patton v. *United States*, 281 U.S. 276 11

Quirin, Ex parte, 317 U.S. 1 ..... 11, 15

Reed, Ex parte, 100 U.S. 13 11
Reid v. *Covert*, 354 U.S. 1 ..... 9, 11, 13, 15, 17, 18, 21, 22, 23, 24, 28
Ross, In re, 140 U.S. 453 23

Schneider v. *New Jersey*, 308 U.S. 147 24
Screws v. *United States*, 325 U.S. 91 28
Shaw v. *United States*, 357 F.2d 949 (Ct. Cl. 1966) 26
Shelton v. *Tucker*, 264 U.S. 479 24

Tally v. *California*, 362 U.S. 60 24
Toth v. *Quarles*, 350 U.S. 11 ..... 9, 22, 23, 24, 27

Page

United States v. *Fox*, 95 U.S. 670 28
United States v. *Tempia*, —— USMCA ——, 35 U.S.L.W. 2625 26

Wade v. *Hunter*, 336 U.S. 648 23
Winters v. *New York*, 333 U.S. 507 26

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Constitution

Article I, Sec. 8, cl. 14 ..... 2, 23
Article III, Sec. 2 ..... 2, 10, 23, 24, 29
Fifth Amendment 3, 10, 23
Sixth Amendment 3, 10, 23

Statutes

Act of 1790, 1 Stat. 112 ..... 14, 15
Act of March 3, 1863, 12 Stat. 736 20

Articles of War

1775 12
1776 ..... 12, 13
1789, 1 Stat. 96 12
1790, 1 Stat. 14 12
1795, 1 Stat. 432 12
1796, 1 Stat. 486 12
1806, 2 Stat. 366 ..... 12, 13, 14
1874 ..... 20, 22
1916, 39 Stat. 650 ..... 7, 19, 20
10 U.S.C. §801 2
§802(1) 3
§880 ..... 4, 6
§882 30
§883 30
§885 30
§918 30
§920 ..... 4, 30
§921 31

	Page
§922	31
§928	5
§930	5, 6
§934	5, 6, 25
Assimilative Crimes Act of 1825, 4 Stat. 115	15
Enrollment Act of 1863, 12 Stat. 736	20
Judiciary Act of 1789, 1 Stat. 73	15
18 U.S.C. §13	15
§81	28
§111-113	28
§202	29
§641	29
§661	28
§1114	29
§2031	28
28 U.S.C. §1254 (1)	2

MISCELLANEOUS:

Adye, *Treatise on Courts-Martial* (1800)	16, 17, 18
Bishop, Court-Martial Jurisdiction Over Military-Civilian Hybrids, 112 U. of Pa. L. Rev. 317 (1964)	11, 18, 19, 30
1 Blackstone, Commentaries	17, 21
British Articles of War of 1765	12, 13
2 Campbell's, *Lives of the Chief Justices* (1874)	18
Comment, 73 Harv. L. Rev. 1626 (1960)	30
Davis, *A Treatise on the Military Law of the United States* (1915)	16, 17, 18
Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435 (1960)	11, 14, 17, 22
Fairman, *The Law of Martial Rule* (1943)	18
Hale, *History of the Common Law of England* (1739)	17, 21

Page

Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957) 12
18 Henry VI 17
7 Henry VII, c. 1 17
3 Henry VIII, c. 5 17
1 Holdsworth, *History of the English Common Law* (1922) 17
2 Journ. Cont. Cong. 85 (1775) 12
1 Macaulay, History of England (1874 ed.) 17, 18
Massachusetts Articles of War of 1775 12
Mutiny Act, 1 William and Mary, c. 5 (1689) 18
Petition of Right of 1627, 3 car. 1 ..... 15, 16, 17
Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion in Law and Contemp. Prob.* 64 (1948) 29
Winthrop, Military Law and Precedents (2d Ed. 1920) 11, 12, 13, 14, 16, 18, 20, 25

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 646

JAMES F. O'CALLAHAN,

Petitioner,

—against—

J. J. PARKER, Warden, United States Penitentiary, Lewisburg, Pennsylvania,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinions of the Court of Appeals for the Third Circuit (R. 27 to 34)[1] are reported at 390 F. 2d 360. The opinion of the District Court (R. 21 to 26) is reported at 256 F. Supp. 679 (M.D. Pa. 1966).

[1] Reference is to the Joint Appendix filed in this Court.

Jurisdiction

The judgment of the Court of Appeals was entered on March 8, 1968 (R. 35). The petition for a writ of certiorari and motion for leave to proceed in forma pauperis was filed on May 6, 1968 and granted by order of this Court dated October 14, 1968 (R. 36). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Question Presented

Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. §801 *et seq.*, have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?

Statutes Involved

Constitution, Art. I, Sec. 8, cl. 14:

> The Congress shall have power . . . to make rules for the Government and Regulation of the land and naval Forces.

Constitution, Art. III, Sec. 2:

> Sec. 2 . . . The trial of all crimes except in case of impeachment shall be by jury; . . .

Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

10 U.S.C. §802(1) [Art. 2 of Articles of War]:

The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induc-

tion into the armed forces; and other persons lawfully called or ordered into, or to duty in and for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

10 U.S.C. §880 (Art. 80 of Articles of War):

(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

10 U.S.C. §920 (Art. 120 of Articles of War):

(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete either of these offenses.

10 U.S.C. §928 (Art. 128 of Articles of War):

(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

10 U.S.C. §930 (Art. 130 of Articles of War):

Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

10 U.S.C. §934 (Art. 134 of Articles of War):

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons

subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Statement

Petitioner, a sergeant in the United States Army, was arrested while on leave and off-post in the early morning hours of July 21, 1956, as a result of an outcry by a guest at the Reef Hotel in Hawaii. He was questioned immediately after his arrest by the hotel security officer and civilian police, after which he was turned over to the military police. Thereafter he was charged with attempted rape, under Art. 80 (10 U.S.C. §880), assault with intent to commit rape, under Art. 130 (10 U.S.C. §930), and house-breaking with intent to commit rape under Art. 134 (10 U.S.C. §934). He was convicted on all counts and sentenced to 10 years at hard labor, a dishonorable discharge and forfeiture of all pay and allowances. The Army Board of Review and the United States Court of Military Appeals affirmed on January 4, 1957 and March 1, 1957, respectively.

After several intermediate steps not relevant in view of the single question accepted by this Court for review, petitioner, acting *pro se,* filed an application in April, 1966 for the writ of habeas corpus which is now before this Court (R. 3). The writ was denied on August 12, 1966 (R. 21). Petitioner appealed and the Court of Appeals affirmed on February 2, 1967 (R. 27). At that point counsel entered the case but after reargument the judgment was affirmed on March 8, 1968 (R. 29, 35).

Summary of the Argument

The question presented by this case is of the greatest significance to millions of present and future members of the armed forces, namely, whether they, alone, of all citizens, may be deprived of a trial before an independent civilian court, by a jury and with full due process rights when charged with a conventional offense which has no relationship to the military.

The right to trial by jury is secured by Article III in all cases in which that right was enjoyed under the common law at the time the Constitution was ratified. A limited and extraordinary exception to that right exists in the case of court-martial jurisdiction, a jurisdiction having well-defined and narrow limitations in 1789, and for over a hundred years prior to and after that date. There is overwhelming historical evidence—both of the American and British practice—showing that in the 17th, 18th and 19th Centuries, court-martial jurisdiction encompassed a narrow class of military offenses: all conventional crimes committed by members of the armed forces were tried by jury before civilian courts. This practice is deeply rooted in the English Constitutional struggle, primarily during the period of the Stuarts, and in the colonial experience which gave rise to one of the stated causes for the Declaration of Independence.

The concept of court-martial jurisdiction over peacetime civilian offenses was first introduced in the Articles of War of 1916. Prior to that time there was no suggestion in our history that trial in a civilian court could be denied in the circumstances of this case.

There is a heavy presumption against such expansion of military jurisdiction, both because it usurps civilian authority and because it deprives the individual of substantial constitutional rights.

In the instant case there exists not only the historically acceptable and constitutionally preferred civilian forums as an available alternative to military tribunals, but there is also no compelling countervailing purpose that is served by the imposition of trial by court-martial.

Congressional power to enact criminal laws is merely incidental to its delegated powers, except in those instances where it exercises its maritime or territorial jurisdiction or its power over a federal enclave. In all other instances there must be a substantial relationship between the acts sought to be proscribed and the federal interest sought to be protected. The commission of conventional offenses off-base and off-duty by members of the armed forces bears little, if any, relationship to the federal interest in the maintenance of military discipline. There is, therefore, no basis for Congressional legislation as to the conventional offenses involved here. And to the extent that there may be a limited military aspect to a civil offense, the jurisdiction of Congress must be appropriately limited to that aspect of the crime, and may not punish the offense in general terms.

ARGUMENT

Introduction

This case presents an issue of far-reaching import which has never been passed upon by this Court and which, every day, becomes more important to the continued liberty of millions of citizens of the United States:

May Congress take away from a member of the Armed Forces the right, enjoyed by all other persons in this country, to be indicted by a grand jury and tried by a petit jury before a civilian court when the offense charged is a conventional crime, having no direct or substantial effect on the maintenance of military discipline, alleged to have been committed in peacetime, while the accused was off-post and off-duty?

Surprisingly, this question has never even been presented to this Court, although the Court has from time to time warned against the extension of the "very limited and extraordinary jurisdiction" of military tribunals and has noted that:

> "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Reid* v. *Covert*, 354 U.S. 1, 21.

See also *Toth* v. *Quarles*, 350 U.S. 11, 23; *Duncan* v. *Kahanamoku*, 327 U.S. 304, 307, 318.

The matter is one of profound significance. We must assume that for the foreseeable future millions of our

citizens will be members of the Armed Forces. A statute which purports to deprive these citizens of their right to trial in a civilian court with its independent juridicary and other constitutional guarantees is contrary to Art. III, Sec. 2 of the Constitution and a violation of the Fifth and Sixth Amendments.

Although the question has never before been squarely presented to or decided by this Court, the Court does not "write on a clean slate. The attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for non-military offenses—has a long history". *Lee* v. *Madigan*, 358 U.S. 228, 232. The Court then stated:

> "Moreover, important constitutional guarantees come into play once the citizen—whether soldier or civilian—is charged with a capital crime such as murder or rape. The most significant of these is the right to trial by jury, one of the most important safeguards against tyranny which our law has designed." *Id.* 234.

This conclusion is amply supported by that "long history" which makes it clear that Congress had no authority to give to the military the power it now claims.

POINT I

Congress Has No Constitutional Authority to Extend Court-Martial Jurisdiction to Conventional Crimes Committed in Peacetime by a Member of the Armed Forces Who Was Off-Post and Off-Duty.

The original understanding of those who drafted the Constitution is highly relevant in determining the meaning of that document; particularly in enforcing the guarantee of a jury trial this Court has looked to English and early American history.

> "The object [of Art. III, Sec. 2] was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future." *Ex Parte Quirin*, 317 U.S. 1, 39.

See also *Callan* v. *Wilson*, 127 U.S. 540, 548; *Cummings* v. *Missouri*, 4 Wall. 277, 332; *Ex Parte Grossman*, 267 U.S. 87, 108-109; *Patton* v. *United States*, 281 U.S. 276, 289.

The history of courts-martial in Anglo-American law has been discussed in some detail by this Court on prior occasions.[2] In the following discussion we will confine ourselves, for the convenience of the Court, to that portion

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[2] *Lee* v. *Madigan*, *supra*, at 232-233; *Ex parte Reed*, 100 U.S. 13, 21; *Caldwell* v. *Parker*, 252 U.S. 376, 380-383, 385-387, 389; *Ex parte Mason*, 105 U.S. 696; *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 83; *Reid* v. *Covert*, *supra*, at 23-30. See generally Winthrop, *Military Law and Precedents* (2d Ed. 1920); Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids*, 112 U. of Pa. L. Rev. 317 (1964); Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435 (1960).

of the history which is particularly relevant to the issue in this case.

Practice during the period before and after the ratification of the Constitution confined court-martial jurisdiction to a very narrow class of military offenses. The Articles of War enacted by the Continental Congress in 1776 established court-martial jurisdiction over only offenses such as treason, desertion, sedition, striking or scorning superior officers, tardiness for parade formation, failure to salute an officer and similar conduct having an obvious military significance. Text in Winthrop, *Military Law and Precedents* 1489 (2d Ed. 1920).[3]

The Articles of War were reenacted in 1789, and on occasion thereafter, and underwent their first revision in 1806.[5] None of these early versions of the Articles asserted court-martial jurisdiction over non-military crimes or over conventional crimes committed off-post and off-duty by members of the Armed Forces. These Articles remained in force, substantially unaltered, until 1863 and were not fully revised until 1874.

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[3] The Articles of 1776, drafted by John Adams and Thomas Jefferson, readopted, without material change the Articles of War of 1775 and minor additions made thereto in that year. Text in Winthrop, *supra*, at 1478, 1486; see also Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293, 298 (1957); 2 Journ. Cont. Cong. 85, 89-96, 111 (1775). The Articles of 1775 were patterned after the Massachusetts Articles of War of 1775 and the British Articles of War of 1765, both of which were similarly limited in coverage to a narrow class of military offenses. Text in Winthrop, *supra* at 1448.

[4] Act of Sept. 29, 1789, c. 25, §4, 1 Stat. 96, text in Winthrop, *supra*, at 1489, reenacted by the Act of Apr. 30, 1790, c. 10, §13, 1 Stat. 14; the Act of Mar. 3, 1795, c. 44, §14, 1 Stat. 432; the Act of May 30, 1796, c. 39, §20, 1 Stat. 486.

[5] Articles of War of 1806, Act of Apr. 10, 1806, §1, Art. 59, 2 Stat. 366, text in Winthrop, *supra* at 1509.

The limitation of the jurisdiction of courts-martial to military crimes was not an accident and is easily understood against the background of then recent English history. See *Reid* v. *Covert*, *supra* at 25-26. The British Articles of War of 1765, from which the American Articles of 1776 were drawn, contained similar provisions limiting court-martial jurisdiction to military crimes. Text in Winthrop, *supra* at 1448; see also *Caldwell* v. *Parker*, 252 U.S. 376, 382.

A reading of the history makes it abundantly clear that there were two abuses about which the English and American civilians were concerned in the 17th and 18th centuries. The first was that the summary trial afforded by a court-martial would deprive the defendant of the basic rights guaranteed to an accused under Anglo-American law. The second was that the army would not punish malefactors at all and thus leave the way open to unbearable offenses committed by the military upon the civilian population. Both of these fears were well justified by the circumstances of the times and both could be avoided by seeing to it that persons accused of crime were to be tried in civilian courts unless the crime was of such a nature that only the military was concerned.

Thus, not only did the 1776 and 1806 Articles of War make no provisions for trial of "civil" crimes, but common to both was the section mandating civilian trial of all non-military offenses. Section X, Article I, of the Articles of 1776 provided that:

> "[w]henever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or prop-

erty of the good people of any of the United States, such as is punishable by the known laws of the land, the commanding officer and the officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or on behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding or assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered."

Substantially the same provision appears in the Articles of 1806 at Art. 33.

The British Articles of War, from which the American Articles were drawn, had always contained a similar provision to compel military compliance with what had become a principle of the English Constitution that all civil offenses committed by servicemen shall be tried by civilian courts.*

The very first criminal statute passed by Congress, the Act of April 30, 1790, §3, 1 Stat. 112, 113, specifically

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* Winthrop, *supra*, at 1446; *Caldwell* v. *Parker*, *supra*, at 382; Duke and Vogel, *supra*, 13 Vand. L. Rev. at 445-446.

made the crime of murder or manslaughter committed "within any fort, arsenal, dock yard, magazine or in any other place or district of the country, under the sole and exclusive jurisdiction of the United States" triable in a federal civilian court.[7]

This consistent practice, several times reviewed and readopted by the early Congresses "must be regarded as a contemporary construction of both Article III, §2, and the Amendments to the Constitution" which "is entitled to the greatest respect. *Stuart* v. *Laird*, 1 Cranch 299, 309; *Field* v. *Clark*, 143 U.S. 649, 691; *United States* v. *Curtiss-Wright Corp.*, 289 U.S. 304, 329". *Ex parte Quirin, supra*, at 41-42.

The history of court-martial jurisdiction in England provides a significant background to our own early attitudes on the matter. The question of court-martial jurisdiction over civilian offenses attained constitutional significance during the reign of the Stuarts in the dispute between the Crown and Parliament over control of the army.

In response to Charles I's "attempt, contrary to the Common Law, [to use] courts-martial to try soldiers for certain non-military offenses",[8] the Parliament adopted its Petition of Right of 1627.[9] The Parliament protested:

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[7] See also the Judiciary Act of 1789, §§9, 11, 1 Stat. 73, 76, 79 granting district and circuit courts jurisdiction over "all crimes and offenses cognizable under the authority of the United States." All other conventional crimes not covered by the Act of 1790 were encompassed by the Assimilative Crimes Act of Mar. 3, 1825, 4 Stat. 115 which is presently codified as 18 U.S.C. §13.

[8] *Reid* v. *Covert, supra* at 24. More particularly, the Crown sought to enforce illegal revenue measures, i.e., revenue measures not passed by Parliament, by quartering troops in the homes of

"nevertheless of late time divers commissions under your Majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny or other outrage or misdemeanor whatsoever, and by such summary course and order as is agreeable to Martial Law, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and then to cause to be executed and put to death according to the Law Martial:"

and demanded:

"that the aforesaid commissions, for proceeding by martial law, may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them and if your Majesty's subject be destroyed, or put to death contrary to the laws and franchise of the land."

Adye, in his *Treatise on Courts-Martial*, reports that Charles assented and dissolved all existing military tri-

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citizens who refused to pay and by trying offenses committed by those troops against the civilian citizens before summary courts-martial. See Adye, *Treatise on Courts-Martial*, 13-14 (1800). See also Davis, *A Treatise on the Military Law of the United States*, 2-3 (1915); Winthrop, *supra*, at 46-47.

*3 Car. 1, c. 1.

bunals. *Id.* at 15. See also Hale, *History of the Common Law of England* 35 (1739).

There was no precedent for the court-martial jurisdiction asserted by Charles I. For martial law as it had been known before the Petition of Right was concerned only with military offenses and was "rather indulged than allowed, and that only in cases of necessity, in time of open war [and] not permitted in time of peace, when the ordinary courts of justice are open." Hale, *supra*, at 36;[10] see also 1 Blackstone, Commentaries 413. And Macauley reports that

> "The Common Law of England knew nothing of courts-martial, and made no distinction, in time of peace, between a soldier and any other subject; nor could the government then [1685] venture to ask even the most loyal parliament for a mutiny bill. A soldier, therefore, by knocking down his colonel, incurred only the ordinary penalties of assault and battery, and, by

[10] Predecessors of the 18th Century English court-martial were the courts of Constable and Marshall dating back to the early 14th Century. The jurisdiction of these courts was not only limited by statutes but as Hale reports "by the very common law". Hale, *History of the Common Law*, 33-34 (1739). While these courts had jurisdiction to hear cases "of death and murder committed beyond the sea . . . [and in time of war of] the offenses and miscarriages of soldiers contrary to the rules of the Army" the extent of this "martial law" was solely to military offenses. Adye, *supra*, at 11-12; Davis, *A Treatise on the Military Law of the United States*, 1 (1915); 1 Holdsworth, *History of the English Common Law*, 573-74 (1922). A major extension of the jurisdiction of these courts was authorized by 18 Henry VI, 7 Henry VII, c. 1 and 3 Henry VIII, c. 5 to cover cases of treason, desertion or sedition of military personnel. Adye, *supra*, at 11-22. Finally, as Hale reports, these courts fell into disuse "upon great reasons". Hale *supra*, at 36. See also *Reid* v. *Covert*, *supra*, at 25 n. 44; Duke and Vogel, *supra*, 13 Vand. L. Rev. at 44 n. 31.

sleeping on guard, or by deserting his colours, incurred no legal penalty at all." 1 Macaulay, *History of England*, 231 (1874 ed.)[11]

The principle against expansion of military jurisdiction over civil offenses was further embedded in the English Constitution by James II's promulgation of Articles of War "authorizing the trial of soldiers for non-military crimes by courts-martial."[12] This action hastened the revolution that brought William and Mary to the throne upon their agreement to abide by a Bill of Rights which, among other things, protected the right of trial by jury." *Reid* v. *Covert*, *supra*, at 26.

One of the first Acts of Parliament after the final overthrow of the Stuarts was the Mutiny Act of 1689,[13] authorizing trial by court-martial, in time of war or civil insurrection, for the military offenses of mutiny, sedition and desertion. See Davis, *supra*, at 2-4; Adye, *supra*, at 60-62; *Reid* v. *Covert*, *supra* at 23-24, n. 42. This authorization, however, was carefully circumscribed by the Act's preamble which declared that except for the necessity of maintaining military discipline,

"Noe man may be forejudged of Life or Limb, or subjected to any kind of punishment by Martial Law, or in other manner than by judgment of his Peeres, and

[11] See also Fairman, *The Law of Martial Rule*, 9 (1943); Bishop, *supra*, 112 U. Pa. L. Rev. at 321-323; 2 Campbell's, *Lives of the Chief Justices*, 351-352.

[12] The Articles of War of James II are reprinted in Winthrop, *supra*, at 1434.

[13] 1 William and Mary, c. 5, reprinted in Winthrop, *supra*, at 1446.

according to the known and established Laws of this Realm."

All of this was familiar history to those who wrote our Constitution and, indeed, the Declaration of Independence itself makes it clear that the concern of Jefferson and his associates for the preservation of a civilian government were based not only on the history of England, but on the history of the colonies. The Declaration of Independence itself protested that George III

"has kept among us, in times of peace, standing armies, without the Consent of our legislature. He has affected to render the Military independent and superior to the Civil Power.

"He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

"For quartering large bodies of armed troops among us: For protecting them by a mock trial, from punishment for any Murders which they should commit on the Inhabitants of these States."

The concept of peacetime court-martial jurisdiction over civilian crimes committed by soldiers was first introduced into our law by the revised Articles of War of 1916, 39 Stat. 650. See Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids,* 112 U. of Pa. L. Rev. 317, 327 (1964). Those Articles asserted military jurisdiction over all offenses by members of the Armed Forces, even in time of peace, except that jurisdiction over capital crimes (such

as murder and rape) was limited to wartime.[14] These 1916 Articles constituted a major break with precedent and, we submit, represented an unconstitutional arrogation of power.

The extent of this break is illustrated by this Court's treatment of the immediate predecessors of the 1916 Articles, the Enrollment Act of 1863[15] and the Articles of War of 1874.[16]

In the midst of the Civil War, Congress passed the Enrollment Act, Section 30 of which made the non-military crimes of murder, assault and rape subject to court-martial jurisdiction, "in time of war, insurrection and rebellion."

The only case in which this Court was called upon to apply §30 was *Coleman* v. *Tennessee*, 97 U.S. 509, where the issue was whether the State of Tennessee had jurisdiction over the crime of murder committed by a soldier in the occupying Union Army. The holding of this Court was expressly limited to a ruling that under §30 *exclusive*

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[14] Article 93, Articles of War of 1916, 39 Stat. 650, 664 provided:

"Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct."

Article 92 of the Articles of War of 1916, 39 Stat. 650, 664 provided:

"Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

[15] Act of March 3, 1863, 12 Stat. 736.

[16] Text in Winthrop, *supra*, at 1523.

jurisdiction to try this crime, committed in occupied territory, had been lodged with the military.

> "[W]hen the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war, and the authority conferred by [§30], exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service." *Id.* at 515.

To hold otherwise would lead to the "incongruous and absurd" result of "permitting an officer or soldier of an invading army to be tried by his enemy, whose country he has invaded." *Id.* at 516.

Thus, as this Court understood it, §30 was only applicable in circumstances equivalent to martial law,[17] where the courts of the State were not open. See *Caldwell* v. *Parker, supra,* at 386; *Coleman* v. *Tennessee, supra,* at 515; *Reid* v. *Covert, supra* at 23-24 n. 42.

In *Coleman,* the Court assumed by way of dictum at p. 514, "the competency of Congress to confer exclusive jurisdiction upon military courts over offenses committed by persons in the military." The Congressional power in this area, said the Court, "would seem to be plenary." But grave dangers inhere in this line of reasoning and it seems inconsistent with modern doctrine. The power to try by

[17] Imposition of military jurisdiction had always been countenanced in time of war when the civilian courts were not sitting. See Blackstone, *supra;* Hale, *supra.* In *Caldwell* v. *Parker, supra,* at 387, the Court recognized "the right of the military authorities, in time of war, within the areas affected by military operations or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified."

court-martial is the power to deprive the citizen—whether soldier or civilian—of important constitutional rights, *Lee* v. *Madigan, supra* at 234, and to destroy the protections of Federalism, *Caldwell* v. *Parker, supra,* at 385-387.[18] For these reasons the *Coleman* dictum should be read in its own narrow context—the unique exigencies of the Civil War, the nation's first conscription law and the Court's apparent vision of marching armies. *Coleman* v. *Tennessee, supra,* at 514-515. This Court, of course, has in many recent decisions seemed to deny the broad assumption of plenary power made in *Coleman*. See *Toth* v. *Quarles, supra,* at 22; *Reid* v. *Covert, supra,* at 23-30. Finally, the "generous" reading of the term "in time of peace" so as to avoid "the dilution of the liberties of the citizen" in *Lee* v. *Madigan, supra,* at 233-235, indicates that given its most expansive reading, the *Coleman* dictum would not apply in peacetime. See also *Caldwell* v. *Parker, supra,* at 385; Duke and Vogel, *supra,* 13 Vand. L. Rev. *supra,* at 450.

In *Ex parte Mason,* 105 U.S. 696, the Court again reviewed §30, reenacted as Art. 58 of the Articles of War of 1874.[19] The very restrictive application of §30 given by the Coleman Court was confirmed and accentuated by the Court's close reading of the General Article, Art. 62,[20] to

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[18] In *Caldwell, id.* at 386-387, the Court intimated that the exercise of military authority of this kind would be an equivalent usurpation of power to that condemned in *Ex parte Milligan,* 4 Wall. (71 U.S.) 2.

[19] Art. 59, which mandated surrender to civilian authorities, was aligned with Art. 58 by the insertion of "except in time of war."

[20] Art. 62 provides: "All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental garrison or a field officers' court-

encompass solely offenses against the military; in this case the instance of a serviceman who, while on guard in a military prison, attempted to kill an inmate.

We are aware that members of this Court have given Art. I, §8, cl. 14 a more flexible reading than we think is required by our history, and have urged that, at least in the context of the problem exemplified by *Reid* v. *Covert*, *supra*, the necessary and proper clause supplements clause 14. See *Reid* v. *Covert*, *supra* at 65, 71 (Harlan, J., concurring); *Kinsella* v. *Singleton*, 361 U.S. 234, 249 (Harlan and Frankfurter, JJ., dissenting). Of course, the special problem of *Covert* raised by *In re Ross*, 140 U.S. 453, does not exist here since the protection of the Constitution unquestionably applies to petitioner. *Burns* v. *Wilson*, 346 U.S. 137; *Wade* v. *Hunter*, 336 U.S. 684. Still, the question may be posed, analogous to the question posed by Mr. Justice Harlan's concurrence in *Covert:* If Congress has the power, through the necessary and proper clause, to extend court-martial jurisdiction to this kind of offense, can it be done here in the face of Art. III and the Fifth and Sixth Amendments? We think it cannot.

This Court has established the general proposition that the constitutional power of Congress to authorize trial by court-martial must be limited to "the least possible power adequate to the end proposed." *Toth* v. *Quarles*, *supra*, at 23; *McElroy* v. *Guagliardo*, 361 U.S. 281, 286. This rule, of course, is but part of a more general rule that, in the treating of any of the fundamental rights of citizens the narrowest and least drastic means available must be em-

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martial according to the nature and degree of the offense, and punished at the discretion of the court."

ployed. *Bloom* v. *Illinois*, 391 U.S. 194, 202-203; *Shelton* v. *Tucker*, 264 U.S. 479, 488; *Schneider* v. *New Jersey*, 308 U.S. 147; *Lovell* v. *Griffin*, 303 U.S. 444; *Tally* v. *California*, 362 U.S. 60. Certainly there can be no more fundamental right than the right to be tried for crime in an Article III court by a jury of one's peers, under the full protection of due process of law.

In this view of the case "the method of trial alone is the issue", *Reid* v. *Covert*, *supra*, at 47 (Frankfurter, J., concurring). The question is whether, as a matter of substantive due process, trial by court-martial is the only reasonable means for protecting the interest of the state in this situation.

There are compelling reasons why purely military offenses, of the kind normally and historically tried by court-martial should be so tried. These offenses, often committed in the line of duty, may pose such an immediate threat to military discipline that "prompt, ready-at-hand means of compelling obedience and order" is necessitated. *Toth* v. *Quarles*, *supra*, at 22. Of course, the necessity is heightened by a state of war and the preparation for or actual engagement of troops in battle. Moreover, the majority of military offenses—infractions of military rules—are of the sort in which the court-martial will have an expertise and which, indeed, may be far beyond the scope of the experience of a civilian court. See *Toth* v. *Quarles*, *supra*, at 18.

The offense involved in this case, one inherently civil in nature, which carries with it extremely serious penalties, was committed while the petitioner was off-base and off-duty. While we argue that such conduct does not constitute a "case arising in the land or naval forces", neverthe-

less, it is certainly apparent that the impact on military discipline, if any, is remote and indirect.

In the Court of Appeals, respondent argued that all three offenses here would lie under the "General Article", Art. 134 of the Articles of War, 10 U.S.C. 934.

The General Article can be traced back to the Revolution and, indeed, back to pre-revolutionary English history. In 1776 it read as follows:

> "All crimes not capital and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the above articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion." Winthrop, *supra*, at 1503.

In one form or another it has been incorporated in all Articles of War ever since. See generally Winthrop, *supra*, at 720-735.

It is clear that the offenses charged, committed off-base, off-duty, have never been encompassed within the scope of the General Article. See *Ex parte Mason*, *supra;* Winthrop, *supra*, at 724. The history of court-martial jurisdiction, extensively cited above, makes this clear. Constitutional rights may not be destroyed by techniques of pleadings, and the words of the Uniform Code cannot be quoted out of historical context to prove jurisdiction.

But even more serious, the suggestion raises more problems than it solves. The General Article is, under modern constitutional doctrine, totally inadequate to support a

criminal conviction. It suffers from the twin vices of overbreadth and vagueness. It reads:

> "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

Read as a criminal statute, this article can hardly stand in the face of *Lanzatta* v. *New Jersey*, 306 U.S. 451; *Connally* v. *General Construction Co.*, 269 U.S. 385, and *Winters* v. *New York*, 333 U.S. 507.

Certainly members of the Armed Forces are entitled to as much protection from a criminal statute so vague and uninformative as is a civilian. The Court of Military Appeals has itself said:

> "The time is long since past when this court will lend its ear to the argument that members of the armed forces are, by reason of their status, *ipso facto* deprived of all protection of the Bill of Rights." *United States* v. *Tempia*, —— USMCA ——, 35 U.S.L.W. 2625.

See, also *Ashe* v. *McNamara*, 355 F. 2d 277 (1st Cir. 1965); *Shaw* v. *United States*, 357 F. 2d 949 (Ct. Cl. 1966); *Kennedy* v. *Commandant*, 377 F. 2d 339 (10th Cir. 1967).

There is here no question that the offense will go unpunished. The civil courts were open, and the crime cognizable under their jurisdiction. Indeed, the choice of method of trial was wholly in the hands of the United States Government, since Hawaii was a territory at the time the crime was committed. *Cf. Grafton* v. *United States,* 206 U.S. 333.

It is unreasonable to contend that "army discipline will be disrupted, its morale impaired or its orderly processes disturbed" by giving soldiers civilian trials for civil offenses, *cf. Toth* v. *Quarles, supra,* at 22, unless it be admitted that the summary nature of court-martial procedure is itself a device for punishing or deterring offenses. But such device is inherently contrary to the Constitution. *Cf. Bloom* v. *Illinois, supra* at 208.

Thus, there are present in this case none of the reasons which might preempt the historically acceptable and constitutionally preferred alternative to trial by court-martial, that of trial in a civilian court with the prized rights to trial by jury and to due process procedures. *Cf. Duncan* v. *Kahanamoku,* 327 U.S. 304.

POINT II

Federal Jurisdiction May Not Extend to Substantive Civil Offenses But Is Confined Solely to Military Offenses or at Most the Military Aspect of Civil Offenses.

Congressional power to declare acts criminal is limited in its exercise to those acts which have "some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An Act not having any such relation is one in respect to which the State can alone legislate." *United States* v. *Fox*, 95 U.S. 670, 672; *cf. Screws* v. *United States*, 325 U.S. 91, 139 (Mr. Justices Roberts, Jackson and Frankfurter dissenting).

We address ourselves here not to the question of whether Congress may make rape an offense punishable by court-martial, but whether Congress may make rape an offense at all except when committed "within the special maritime and territorial jurisdiction of the United States", 18 U.S.C. 2031. See also 18 U.S.C. 81 (arson); 18 U.S.C. 111 (assault); 18 U.S.C. 661 (embezzlement); 18 U.S.C. 111, 112, 113 (homicide) and other similar provisions of the Code.

The question presented by this case is not answered by a finding that there is military jurisdiction over the *person* of a soldier. For a distinctly different question from that raised in *Reid* v. *Covert*, *supra* and *Kinsella* v. *Singleton*, *supra*, is raised here, namely, whether there is any jurisdiction over the *offense*.

Rape, attempted rape and assault are public offenses against the community. The government which normally represents this community is the State, and the Federal

government has no jurisdiction except where it acts pursuant to Art. IV, §3, of the Constitution.[21] See Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 Law and Contemp. Prob. 64 (1948). The Federal government cannot acquire jurisdiction over an offense not otherwise coming within its power merely by virtue of the status of the person charged with crime.

Of course, Congress may make conduct criminal, dependent on the status of the defendant, but only when there is some direct relationship between the conduct prohibited and the status of the defendant—e.g., only a federal official may be guilty of the federal crime of soliciting a bribe to influence him in the performance of his duty (18 U.S.C. 202), but certainly Congress could not provide that rape, when committed by a federal employee, thereby becomes a federal offense.

Certain offenses which have a "direct relation to the execution of a power of Congress" may be punished by Congress, but the offense punished in such a case is not the substantive civil crime of, e.g., murder, but the "federal" crime of murder of an officer or employee of the United States (18 U.S.C. 1114). Congress may not punish embezzlement, but it may punish embezzlement of property of the United States (18 U.S.C. 641). In such cases, the definition of the crime and the penalty therefor must be related to the federal interest Congress seeks to protect, and not the general community interest which may be concerned. And the status of the defendant cannot turn an ordinary state crime into a federal crime without

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[21] It is clear that Article III, Section 2 cl. 3 and the other Constitutional protections to criminal defendants would be applicable in such a case.

such federal interest. See adopting this view, Bishop, *supra*, 112 U. of Pa. L. Rev. at 553-556, 377; Comment, 73 Harv. L. Rev. 1626 (1960).

This principle was considered in detail by this Court in *Ex parte Mason, supra* at 698:

> "The *gravamen* of the military offense is, that while standing guard as a soldier over a jail in which a prisoner was confined, the accused willfully and maliciously attempted to kill the prisoner. Shooting, with intent to kill, is a civil crime, but shooting a soldier of the army standing guard over a prison, with intent to kill a prisoner confined there, is not only a crime against society, but an atrocious breach of military discipline. . . . It follows that the crime charged and for which the trial was had was not simply an assault with intent to kill, but an assault by a soldier on duty with intent to kill a prisoner confined in a jail over which he was standing guard."

This fundamental distinction between state and federal jurisdiction over crime was totally ignored by the Congress in writing the Uniform Code of Military Justice. Some of the crimes defined are clearly military in nature, and their relationship to a federal (i.e. military) interest is apparent. See Art. 82 (10 U.S.C. 882) which punishes solicitation to desert or to commit an act of misbehavior before the enemy; or Art. 83 (10 U.S.C. 883), relating to fraudulent enlistment, or Art. 85 (10 U.S.C. 885) which punishes desertion.

But Art. 118 (10 U.S.C. 918) relates to murder, without reference to any military interest, other than the status of the accused. Art. 120 (10 U.S.C. 920) punishes rape;

Art. 121 (10 U.S.C. 921) punishes larceny; Art. 122 (10 U.S.C. 922) punishes robbery. *Cf. Grafton* v. *United States, supra.* What is the reason for asserting federal jurisdiction over such offenses, which do not contain, as a statutory element, any federal interest?

Criminal jurisdiction is, fundamentally, a state matter; there is no general federal criminal jurisdiction, and hence, there can be no general federal court-martial jurisdiction over crimes.

CONCLUSION

The Judgment below should be reversed.

Respectfully submitted,

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of argument	4
Argument:	
I. Congress has constitutional power to provide for trial by court-martial of all offenses committed by persons who are members of the land and naval forces	6
A. This Court's analyses of court-martial jurisdiction necessarily imply coverage of non-military crimes committed by persons in military status	8
B. The historical background of Clause 14 supports the interpretation that it gives Congress power over all criminal acts by persons in military status	11
C. Congressional action, rather than indicating any want of power under the Constitution, is indicative of an inclination to act only as particular needs arose	20
II. Congress has reasonably found a military need for the jurisdiction here involved	25
III. Petitioner was in military status when he committed the offenses	32
Conclusion	33
Appendix (Instances of Military Punishment for Non-Military Crimes, 1775–1815)	35

330-341—69——1

CITATIONS

Cases:

	Page
Billings v. *Truesdell*, 321 U.S. 542	32
Burns v. *Taylor*, 274 F. 2d 141, certiorari denied, 364 U.S. 837	11
Burns v. *Wilson*, 346 U.S. 137	31
Caldwell v. *Parker*, 252 U.S. 376	15
Coleman v. *Tennessee*, 97 U.S. 509	8
Dynes v. *Hoover*, 20 How. 65	6
Duncan v. *Louisiana*, 391 U.S. 145	29, 30
Gibson v. *United States*, 329 U.S. 338	32
Grafton v. *United States*, 206 U.S. 333	8, 21, 23
Grimley, In re, 137 U.S. 147	32
Hironimus v. *Durant*, 168 F. 2d 288, certiorari denied, 335 U.S. 818	32
Homlitas v. *United States*, 202 F. Supp. 520	33
Hurtado v. *California*, 110 U.S. 516	29
Johnson v. *Sayre*, 158 U.S. 109	6, 8
Kahn v. *Anderson*, 255 U.S. 1	32
Kinsella v. *United States ex rel. Singleton*, 361 U.S. 234	4, 6, 8, 10, 11
Lee v. *Madigan*, 358 U.S. 228	22
Mason, Ex Parte, 105 U.S. 696	6, 15
Milligan, Ex Parte, 4 Wall. 2	6, 7, 8
Owens v. *Markley*, 289 F. 2d 751	11
Orloff v. *Willoughby*, 345 U.S. 83	28, 30
Quirin, Ex Parte, 317 U.S. 1	4, 7, 8
Reid v. *Covert*, 354 U.S. 1	7, 8, 20
Smith v. *Whitney*, 116 U.S. 167	8
Thompson v. *Willingham*, 318 F. 2d 657	3, 11
Toth v. *Quarles*, 350 U.S. 11	9
Whelchel v. *McDonald*, 340 U.S. 122	7
Wright v. *Markley*, 351 F. 2d 592	11

Constitution, statutes, and regulations:

	Page
Constitution of the United States:	
Bill of Rights	30
Article I	4
Article I, Section 8, clause 14	6, 7, 11, 19
Article III	25
Fifth Amendment	6, 7
Sixth Amendment	6, 29
Fourteenth Amendment	29
Act of April 23, 1800, Ch. 33, 2 Stat. 45, *et seq.*	15
Act of March 3, 1863, Ch. 75, § 30, 12 Stat. 731	21
12 Anne, c. 13	18
Article of War 44, of 1720	18
Articles of War of 1775	12, 16
Articles of War of 1776	16
Section IX, Article 1	15
Section X, Article 1	15
Articles of War of 1786	16
Articles of War of James II, Arts. XVII–XVIII, reprinted in Winthrop, App. V, p. 922	17, 18
Articles of War, 1916 (39 Stat. 650)	21, 22, 23
British Articles of War of 1765 (Winthrop, App. VII)	19
43 Geo. 3, c. 20	18
Military Justice Act of 1968, Public Law 90–632, 82 Stat. 1335	31
Mutiny Act of 1720	18, 19
Revised Stat. 1342, Art. 59 (1874)	21

Constitution, statutes, and regulations—Continued
Uniform Code of Military Justice: Page
10 U.S.C. 701(e) 32
10 U.S.C. 810 29
10 U.S.C. 814 24
10 U.S.C. 833 29
10 U.S.C. 880 2
10 U.S.C. 918 24
10 U.S.C. 920 24
Soldiers and Sailors Civil Relief Act of 1940 (50 U.S.C. App. 501, et seq.) 33
10 U.S.C. 930 2
10 U.S.C. 934 2, 13
Army Regulation 22–160 26
Army Regulation 27–10, c. 7 26
Army Regulation 633–1, para. 9 26
1 W. & M., c. 4 (reprinted in Winthrop, App. VI, p. 929) 18
Miscellaneous:
Articles of Confederation, Article 9, Para. 4 11
3 Blackstone, Commentaries 379 30
1 Crosskey, *Politics and the Constitution*, (1953) 20
Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435 17, 18, 23
5 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787 (2d ed. 1901)* 11

Miscellaneous—Continued

	Page
2 M. Farrand, *The Records of the Federal Convention of 1787*, (1911)	11
Frankfurter and Landis, *The Business of the Supreme Court* (1928)	25
Alexander Hamilton, *The Federalist*, Number 23	11
Hearing Before the Senate Subcommittee on Military Affairs, an Appendix to S. Rep. No. 130, 64th Cong., 1st Sess	23
Hearings pursuant to S. Res. 260 before the Subcommittee on Constitutional Rights of Committee on the the Judiciary, 87th Cong., 2d Sess	25
2 Journals of the Continental Congress 89	12
1 Macaulay, *History of England*, 231 (1874 ed.)	17
NATO Status of Forces Agreement, Article VII, 4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67	26, 27
Petition of Right of 1627, 3 Car. 1, c. 1	17
S. Rep. No. 1630, 90th Cong., 2d Sess. (1968)	27
Summary-Report of Hearings by the Subcommittee on Constitutional Rights of the Committee on the Judiciary, Constitutional Rights of Military Personnel, 88th Cong., 1st Sess. (Committee print 1963)	25
Weigley, *History of the United States Army* (1967)	24
Wiener, *Civilians under Military Justice* (1967)	19
Wiener, *Courts-Martial and the Bill of Rights, the Original Practice I*, 72 Harv. L. Rev. 1	16
Winthrop, *Military Law and Precedents* (1920 War Dept. Reprint)	13, 14, 15, 17
14 Writings of Washington	14

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 646

JAMES F. O'CALLAHAN, PETITIONER

v.

PARKER, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (R. 27–34)[1] are reported at 390 F. 2d 360. The opinion of the district court (R. 21–26) is reported at 256 F. Supp. 679.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1968. A petition for a writ of certiorari was filed on May 6, 1968, and was granted on October 14, 1968 (R. 36). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] "R." refers to the Joint Appendix filed in this Court.

QUESTION PRESENTED

This Court granted certiorari limited to the first question presented by the petition, which reads as follows (R. 36):

> Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 et seq., have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?

STATEMENT

After a trial by court-martial in the then Territory of Hawaii, petitioner, a sergeant in the Army, was convicted on all charges against him: attempted rape, housebreaking with intent to commit rape, and assault with intent to rape (10 U.S.C. 880, 930, 934). On October 11, 1956, he was sentenced to ten years' confinement at hard labor, forfeiture of all pay and allowances, and a dishonorable discharge. The Army Board of Review affirmed and in March 1957 the United States Court of Military Appeals declined review (R. 4).

The evidence (which is set forth in detail in the opinion of the court below at R. 30–33) showed that petitioner, on the night of July 20, 1956, while on leave and off his military post, entered the room of a fourteen year old girl in the Reef Hotel in Honolulu with

intent to commit rape, and struck and bound her in the course of a rape attempt before the girl managed to escape and shout for assistance. Petitioner was apprehended as he was attempting to leave the hotel grounds, and the civilian police subsequently turned him over to the military.

The present case arises from a habeas corpus action commenced by petitioner in the United States District Court for the Middle District of Pennsylvania in April 1966, in which he attacked (*inter alia*) the jurisdiction of the court-martial to try him for a non-military offense committed off-post while on leave. The district court declined to consider the issue, since petitioner had raised it in a prior habeas corpus proceeding in the District of Massachusetts when he was confined there (R. 23). Chief Judge Wyzanski had denied the Massachusetts petition with a memorandum opinion and petitioner took no appeal.[2] Petitioner appealed the denial of his present habeas corpus petition to the United States Court of Appeals for the Third Circuit, which considered the jurisdictional question and held, on the basis of its ruling in *Thompson* v. *Willingham*, 318 F. 2d 657 (C.A. 3), that court-martial jurisdiction existed (R. 34).

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[2] In connection with the Memorandum in Opposition to the instant certiorari petition, we lodged with the Clerk of this Court a copy of Judge Wyzanski's unreported opinion. Petitioner was then in custody because of his conviction in Massachusetts for rape in 1962 while on parole from his federal sentence, and is presently in custody by reason of the resulting revocation of the federal parole in 1966 after the state sentence had been served. Petitioner is currently due to be released in June 1970.

330-341—69——2

SUMMARY OF ARGUMENT

This Court has consistently indicated its view that the test for determining the constitutionality of court-martial jurisdiction in time of peace is the status of the accused—*i.e.*, whether the accused is a member of the land and naval forces—and not the nature of the offense. See, *e.g.*, *Ex parte Quirin*, 317 U.S. 1, 43; *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 239–243. Article I of the Constitution, which grants power to Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," bears no limitation as to types of offenses or the place where they are committed. The Framers entrusted Congress with the responsibility to determine, within the limits of procedural fairness, whether and how members of the land and naval forces would be tried for offenses committed while they are in such status.

History supports this view. Records of courts-martial trials during the period contemporaneous with the Constitution's ratification show that such trials of members of the army for non-military offenses committed off-post or while on leave were frequent. The Framers, many of whom served in the Continental Army, were undoubtedly aware of the practice of trying soldiers for such conduct pursuant to the general military article. Nor does the prior British history of court-martial jurisdiction support a reading of the Constitution which would limit court-martial jurisdiction to certain types of offenses. That history reflects only a long-standing dispute between Parliament and

the Crown as to which of them had the power to prescribe articles of war in time of peace. The Framers chose to have such power reside in Congress.

Congressional action in the field of court-martial jurisdiction has reflected these principles. In the earliest period, Congress conferred jurisdiction on courts-martial to try members of the navy who were accused of non-military offenses on shore. That specific jurisdiction over non-military crimes committed by members of the army in wartime was not enacted until pose to act only as a need arose. Until the Civil War this country's standing army was small and the general article was considered adequate to handle the limited number of cases that might arise. With that conflict and the world wars which later ensued, the size of the standing army grew drastically, necessitating more specialized provisions for dealing with military offenders.

Court-martial jurisdiction over non-military crimes is concurrent with that of civil authorities and effective accommodations have been worked out. Although petitioner argues that trial by jury in all instances would be a preferable mode of trial for servicemen, the Framers expressly left that choice to Congress. Moreover, servicemen are not well situated to enjoy the benefits of trial by jury in civilian courts, since their society and peers tend to be other members of the military establishment with whom they form a separate community. Court-martial jurisdiction avoids the separation of the accused from that com-

the third year of the Civil War and was not extended to peacetime until 1916 indicates, rather than any lack of constitutional power, merely a congressional pur-

munity and enables military authorities to maintain control over military personnel.

The congressional judgment that members of the armed forces today who commit non-military offenses should remain subject to court-martial jurisdiction is thus reasonable and should be respected. The fact that petitioner was on leave when he committed the instant offenses did not remove him from the status of a member of the land and naval forces. It follows that the judgment below should be affirmed.

ARGUMENT

I

CONGRESS HAS CONSTITUTIONAL POWER TO PROVIDE FOR TRIAL BY COURT-MARTIAL OF ALL OFFENSES COMMITTED BY PERSONS WHO ARE MEMBERS OF THE LAND AND NAVAL FORCES

Court-martial jurisdiction derives from Article I, Section 8, Clause 14 of the Constitution, which vests in Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces". There is no dispute that the power there granted includes the power to create offenses and to punish them. See *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246–247. And of course, when a case arises in the land or naval forces, the Fifth and Sixth Amendment rights to indictment by a grand jury and to trial by a petit jury are inapplicable. *Dynes* v. *Hoover,* 20 How. 65, 78–79; *Ex Parte Milligan,* 4 Wall. 2, 137–139; *Ex Parte Mason,* 105 U.S. 696, 700–701; *Johnson* v. *Sayre,* 158 U.S. 109; *Ex Parte*

Quirin, 317 U.S. 1, 40; *Whelchel* v. *McDonald*, 340 U.S. 122, 127. The grand jury provision of the Fifth Amendment explicitly excepts "cases arising in the land or naval forces", and the exception applies by implication also to the petit jury provision of the Sixth Amendment. *Ex Parte Milligan, supra; Ex Parte Quirin, supra.* These exceptions are "designed to correlate with the power granted Congress to provide for the 'Government and Regulation' of the armed services * * *." *Reid* v. *Covert*, 354 U.S. 1, 22.

This case thus concerns the scope of Article I, Section 8, Clause 14. The basic question is whether the power of Congress to provide for punishment of offenses in the exercise of its power over the land and naval forces depends solely on the status of the person who commits the offense or whether it varies according to the nature of the offense he commits and the place where he commits it. As we show below, the decisions of this Court have consistently made the scope of the court-martial power granted by Clause 14 turn upon the military status of the individual tried, and history supports that view. Whether and how to exercise that power over military personnel is a matter for legislative judgment. Since petitioner's status was unquestionably that of a soldier when he committed the offenses here involved, and since Congress has made the judgment that soldiers charged with those offenses may be tried by court-martial, petitioner was validly convicted and is validly in custody.

A. THIS COURT'S ANALYSES OF COURT-MARTIAL JURISDICTION NECESSARILY IMPLY COVERAGE OF NON-MILITARY CRIMES COMMITTED BY PERSONS IN MILITARY STATUS

Although this Court has never explicitly decided the question presented here, it has consistently treated court-martial jurisdiction as dependent solely upon the military status of the person tried, without regard to the nature of his offense. And it has consistently declared its considered view that persons serving in the armed forces may constitutionally be subjected to court-martial for any offense they commit while so serving. *E.g., Ex Parte Milligan,* 4 Wall. 2, 123; *Coleman* v. *Tennessee,* 97 U.S. 509, 513–514; *Smith* v. *Whitney,* 116 U.S. 167, 183–185; *Johnson* v. *Sayre,* 158 U.S. 109, 114; *Grafton* v. *United States,* 206 U.S. 333, 348; *Ex Parte Quirin,* 317 U.S. 1, 43; *Reid* v. *Covert,* 354 U.S. 1, 23; *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246.

In *Ex Parte Quirin, supra,* (sustaining military trial of belligerent aliens or citizens for attempted sabotage in the United States in time of war) the Court thoroughly examined the foundations of military jurisdiction and observed:

> The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses [by nonmembers of the forces] against the law of war. Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil

> courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law. * * * [317 U.S. at 43.]

This Court's more recent decisions sustaining challenges to military power to try persons not members of the armed forces in peacetime have in no way undermined this doctrine as to persons who are members of the armed forces, and indeed their analysis sustains it: *E.g., United States ex rel. Toth* v. *Quarles,* 350 U.S. 11; *Reid* v. *Covert, supra; Kinsella* v. *United States ex rel. Singleton, supra. Kinsella,* the last major pronouncement on court-martial jurisdiction, provides an illuminating review of the decisions in *Toth* and *Covert,* and concludes with a succinct statement of the principle that governs the present case as well as those cases:

> The *Toth* case involved a discharged soldier who was tried by court-martial after his discharge from the Army, for an offense committed before his discharge. * * * The holding of the case may be summed up in its own words, namely, that "the power granted Congress 'To make Rules' to regulate the 'land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." *Id.,* at 15.
>
> It was with this gloss on Clause 14 that the Court reached the second *Covert* case, *supra.* There, as we have noted, the person involved was the civilian dependent of a soldier, who was accompanying him outside the United States

> when the capital offense complained of was committed. The majority concluded that "trial by court-martial is constitutionally permissible *only* for persons who can, *on a fair appraisal,* be regarded as falling within the authority given to Congress under Article I to regulate the 'land and naval Forces'. * * * Concurring opinion, 354 U.S., at 42. (Italics supplied). The test for jurisdiction, it follows, is one of *status,* namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term "land and naval Forces." [361 U.S. at 239–241. Footnote omitted.]

Significantly, in *Kinsella,* which also involved the power of a court-martial to try a civilian dependent of a member of the armed forces, the government sought to distinguish *Covert* on the basis that *Covert* concerned a capital offense. In rejecting the distinction, the Court observed:

> The Government makes no claim that historically there was ever any distinction made as to the jurisdiction of courts-martial to try civilian dependents on the basis of capital as against noncapital offenses. Without contradiction, the materials furnished show that military jurisdiction has always been based on the "status" of the accused, rather than on the nature of the offense. To say that military jurisdiction "defies definition in terms of military 'status' " is to defy unambiguous language of Art. I, § 8, cl. 14, as well as the historical background thereof and the precedents with reference thereto. [361 U.S. at 243. Footnote omitted.]

In other words, the test evolved by this Court, con-

sistent with the history and plain language of Clause 14, is whether there is jurisdiction over the *person* of a court-martial defendant; the grant of power to Congress under Clause 14 "bears no limitation as to offenses." *Kinsella, supra,* 361 U.S. at 246. Implicitly applying this test, the lower federal courts have uniformly rejected the challenge to court-martial jurisdiction here advanced. *E.g., Burns* v. *Taylor,* 274 F. 2d 141 (C.A. 10), certiorari denied, 364 U.S. 837; *Owens* v. *Markley,* 289 F. 2d 751 (C.A. 7); *Thompson* v. *Willingham,* 318 F. 2d 657 (C.A. 3); *Wright* v. *Markley,* 351 F. 2d 592 (C.A. 7).

B. THE HISTORICAL BACKGROUND OF CLAUSE 14 SUPPORTS THE INTERPRETATION THAT IT GIVES CONGRESS POWER OVER ALL CRIMINAL ACTS BY PERSONS IN MILITARY STATUS

Clause 14 was taken from the parallel provision of the Articles of Confederation without discussion (2 M. Farrand, *The Records of the Federal Convention of 1787,* 329–330 (1911); 5 J. Elliott, *Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787,* 442–443, 544–545 (2d ed. 1901)). Article 9, Paragraph 4 of the Articles of Confederation gave Congress, *inter alia,* "sole and exclusive right and power of * * * making rules for the government and the regulation of the * * * land and naval forces." Alexander Hamilton wrote in *The Federalist,* Number 23, that this power (in addition to the power to raise armies and to build and equip fleets) was intended "to exist without limitation, because it is impossible to foresee or define the extent

and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them."

Military practice at the time of ratification of the Constitution indicates—contrary to petitioner's undocumented assertion (Pet. Br. 7) that "all conventional crimes committed by members of the armed forces were tried by jury before civilian courts"—that court-martial jurisdiction was commonly understood to include the trial of soldiers for non-military offenses, even when committed off-post and off duty. An examination of court-martial cases actually tried during the period reveals numerous instances of court-martial trials of servicemen for non-military offenses. In the Appendix hereto we have listed more than 100 such instances, including the crimes of simple assault of a civilian, drunkenness, rioting in town, fraud, and cashing a bad check in a civilian restaurant. Among the more serious offenses can be found housebreaking (as charged in the instant case), theft, robbery, and attempted sodomy. Moreover, it appears that many of these offenses occurred off-post or were committed by servicemen not in duty status at the time of the offenses, or had both of those characteristics.

The statutory vehicle for such court-martial prosecutions was the so-called general article, first enacted in the 1775 Articles of War prepared by a committee headed by George Washington and adopted by the Continental Congress (see 2 Journals of the Continental Congress 89–90, 110). The article provided:

> "All crimes, not capital, and all disorders and neglects, which officers and soldiers may be

> guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion"[3] (Articles of War of 1775, Article L).

The Framers of the Constitution, many of whom served in the Continental Army during the Revolutionary War and participated in the drafting and adoption of the early articles of war, were undoubtedly aware of this practice of trying soldiers by court-martial for non-military offenses under the general article. In fact, George Washington, upon being informed of the decision of a military Court of Inquiry that a complaint by a civilian against an officer should lie only in civil law, placed the following in his General Order for Wednesday, February 24, 1779:

> The General is sorry to find that the court seem to have mistaken his intention. He had no doubt that an inhabitant who conceives himself aggrieved by an officer has a right to seek

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[3] Set forth in Winthrop, *Military Law and Precedents* 957 (1920 War Department Reprint of 2d ed. 1896) (hereafter Winthrop).

The so-called general article, or a variant thereof, has appeared in each subsequent enactment of articles of war by Congress (see Winthrop, pp. 953, 961, 976, and 986) including the latest enactment of the Uniform Code of Military Justice (10 U.S.C. 934).

Petitioner's historical discussion errs in pointing only to the specific prohibitions of the articles of war at the time of ratification of the Constitution, and ignores altogether the use of the general articles to punish non-military crimes.

> redress from the civil-law; but he wishes to have the opinion of the court explicitly on the particular merits of the complaint against Colo. Craige in order to determine how far the complainant might be entitled to redress from military justice.
>
> All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other. * * * [14 Writings of Washington 140–141 (1779)].

See also *id.* at 185–186.

In 1776 new articles of war were adopted by Congress, continuing the general article and adding two new provisions that are particularly illuminating:

> Every officer commanding in quarters, garrisons, or on a march, shall keep good order, and, to the utmost of his power, redress all such abuses or disorders which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers beating, or otherwise ill-treating any person; of disturbing fairs or markets; or of committing any kind of riots to the disquieting of the good people of the United States; he the said commander, who shall refuse or omit to see justice done on the offender or offenders, and reparation made to the party or parties injured, as far as part of the offender's pay shall enable him or them, shall, upon proof thereof, be punished, by a general court-martial, as if he himself had committeed the crimes

> or disorders complained of [Articles of War 1776, Section IX, Article 1].
>
> Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or property of the good people of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required *upon application duly made* by or in behalf of the party or parties injured, to use his utmost endeavor to deliver over such accused person or persons to the civil magistrate * * *. [Articles of War of 1776, Section X, Article 1; Emphasis added.] [4]

Section IX, Article 1, considered with the following section providing for delivery of offenders to civil authorities "upon application duly made", strongly suggests that, if no application was made, military jurisdiction was to be exercised when the people of the States were subjected to abuses and disorders by officers or soldiers. Indeed, as has been indicated, this was in fact the way in which these provisions were interpreted and administered, and this Court has noted the practice. See *Ex Parte Mason,* 105 U.S. 696, 699; *Caldwell* v. *Parker,* 252 U.S. 376, 381–382.

A further defect in petitioner's argument on the intention of the Framers as revealed in the early American articles of war may be found by examining the Articles for the Better Government of the Navy (Act of April 23, 1800, Ch. 33, 2 Stat. 45). See Wiener,

[4] Set forth in Winthrop, *supra* n. 3, at 961, 964.

Courts-Martial and the Bill of Rights: The Original Practice I, 72 Harv. L. Rev. 1, 13–15. There Congress gave naval courts-martial specific jurisdiction over "[a]ll offences committed by persons belonging to the navy while on shore" which could be punished as if they had occurred at sea (2 Stat. 47, Article XVII). At sea, court-martial jurisdiction extended to such common law crimes as murder, embezzlement, and theft (2 Stat. 48, Articles XXI, XXIV, XXVI). It is incongruous to argue that the Framers of the Constitution did not intend to grant Congress the power to extend court-martial jurisdiction to non-military offenses because the Articles of War passed by Congress in 1775, 1776 and 1786 contained no such specific grant of jurisdiction, while at the same time the Naval Articles, also passed by Congress, did grant such specific jurisdiction. Rather, it is thus made clear that the constitutional grant of legislative power generally as to the "land or naval forces" was understood to be broad enough to cover criminal acts by military personnel on leave in United States territory. Whatever statutory limitations there were on Army courts-martial were therefore the result of legislative choice, and not of any want of constitutional power to adopt identical provisions for both services.

The prior British history on which petitioner relies does not suggest any purpose of the Framers of the Constitution to limit the power of Congress to determine which offenses committed by members of the armed forces should be subject to trial by courts-martial. That history shows only that Parliament did not trust the Crown to make that determination and

reflects the long-standing dispute as to which of them might establish military law within the realm in time of peace (see Winthrop, *supra* n. 3, 19–20).

While the origin of the court-martial is unclear, it had become well established by the seventeenth century that in time of war the Crown could adopt articles of war governing the army. Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 14 Vand. L. Rev. 435, 441–442 (1960) (hereafter Duke and Vogel). In the early seventeenth century, Charles I further issued commissions for the enforcement of military law against soldiers and sailors in time of peace. Parliament rejoined with its Petition of Right of 1627 (3 Car. 1, c. 1, set forth at Pet. Br. 16), demanding that the "aforesaid commissions, for proceeding by martial law, * * * be revoked" and that no commissions of like nature thereafter issue. Charles I assented and dissolved the tribunals, and as late as the 1680's English law permitted no court-martial jurisdiction in time of peace, even for military offenses such as "knocking down [one's] colonel." See 1 Macaulay, *History of England*, 231 (1874 ed.), set forth at Pet. Br. 17–18. In 1688, however, James II issued articles of war for the governance of the standing army in time of peace, which included punishment for such non-military crimes as "murders and wilful killing of any Person" and "Robbery and theft committed by any Person in or belonging to the Army." Articles of War of James II, Arts. XVII–XVIII, re-

printed in Winthrop, App. V, p. 922. Parliament responded again in the Bill of Rights of 1689, which provided that standing armies in peacetime were unlawful without the consent of Parliament, and almost immediately thereafter consolidated its control with the first Mutiny Act, providing for court-martial of soldiers in time of peace but specifically restricting the jurisdiction to the offenses of mutiny, sedition and desertion. 1 W. & M., c. 4, reprinted in Winthrop, App. VI, p. 929.

Petitioner's examination of the pertinent British history prior to adoption of the Constitution stops at this point (Pet. Br. 18–19). Thus, petitioner not only misinterprets the tug-of-war over legislative jurisdiction as a parliamentary antipathy to courts-martial as such, but also ignores relevant subsequent developments in Britain that were more immediately in the minds of the American Framers than was the earlier history.

In 1712 Parliament authorized the Crown to adopt articles of war providing generally for courts-martial of soldiers in overseas dominions in time of peace (12 Anne, c. 13; Duke and Vogel p. 444).[5] Subsequently, the articles of war provided, pursuant to Section 46 of the Mutiny Act of 1720, that if no application for civil jurisdiction was made within eight days of an offense punishable under the articles, the offender might be tried by court-martial (Article of War 44 of 1720). While the "within eight days" provision was

[5] In 1803, this authorization was extended to permit articles of war applicable to troops stationed in England in peacetime (43 Geo. 3, c. 20; Duke and Vogel, p. 444).

in effect, the law officers held that, in the absence of a civil complaint within eight days, a court-martial could lawfully try a soldier for murder (Wiener, *Civilians under Military Justice,* Appendix 1A, pp. 245–246 (1967) (hereafter Wiener)). In 1721, the "within eight days" section of the Mutiny Act was dropped; thereafter it was only "in our garrison of Gibraltar, Island of Minorca, Forts of Placentia and Annapolis Royal, * * * or in any other Place beyond the Seas, * * * where there is no form of Our Civil Judicature in Force" that crimes not mentioned in the Mutiny Act could be tried by courts-martial (Wiener p. 14), and this provision remained in the British Articles of War of 1765, applicable at the time of the American Revolution. See Winthrop, App. VII, pp. 931, 937. It is noteworthy that Parliament did thus recognize for a time that where no civil application was made a soldier could be tried by court-martial for a civil offense.[6] That Parliament chose to restrict that jurisdiction at a later date indicates only that the legislature had determined the grant of jurisdiction to be no longer expedient, not that there was any constitutional bar. Significantly, the Framers did not choose to import any similar limitations into the American Constitution.

The foregoing history does not suggest any intent to limit the scope of Article I, Section 8, clause

[6] This relatively recent, although discontinued, British practice may well have been the basis for the civil application procedure specified in the American Articles of War of 1776, quoted *supra*, pp. 14–15.

14 of the Constitution to military offenses; rather it shows the background of struggle between the Parliament and the Crown that resulted in the Framers' decision to vest power to determine jurisdiction over the land and naval forces in the legislative Branch. As Mr. Justice Harlan, concurring in *Reid* v. *Covert*, 354 U.S. 1, 68, stated:

> True, the records of the time indicate that the Founders shared a deep fear of an unchecked military branch. But what they feared was a military branch unchecked by the *legislature*, and susceptible of use by an arbitrary *executive* power. So far as I know, there is no evidence at all that the Founders intended to limit the power of the *people*, as embodied in the legislature, to make such laws in the regulation of the land and naval forces as are necessary to the proper functioning of those forces. In other words, there is no indication that any special limitation on the power of Congress, as opposed to the power of the executive, was subsumed in the grant of power to govern the land and naval forces. * * *

See also 1 Crosskey, *Politics and the Constitution*, 413–414, 424–425 (1953).

C. CONGRESSIONAL ACTION, RATHER THAN INDICATING ANY WANT OF POWER UNDER THE CONSTITUTION, IS INDICATIVE OF AN INCLINATION TO ACT ONLY AS PARTICULAR NEEDS AROSE

In 1863, during the Civil War, Congress for the first time made *specific* provision in the Articles of War for the trial of non-military crimes in time of

war.[7] Until then, the general article had been considered to provide the Army (as distinguished from the Navy, see *supra* pp. 15–16) with an adequate basis for the exercise of such non-military criminal jurisdiction as might be necessary for the regulation of its small force. Except for minor changes in 1874 removing the duty to surrender soldiers to civil authorities in time of war (Rev. Stat. 1342, Art. 59), the pertinent Articles were not further revised until 1916. There continued to be no specific provision—other than the traditional jurisdiction over non-capital crimes under the general article, see *Grafton* v. *United States,* 206 U.S. 333, 348—relating to non-military offenses in peacetime.

The revised Articles of 1916 (39 Stat. 650) first made specific provision for peacetime court-martial jurisdiction over various enumerated non-capital of-

[7] The provision, contained within an enactment for the enrolling and calling out of national forces, passed by Congress in March 1863, was as follows:

> That in time of war, insurrection, or rebellion, murder, assault, and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offence shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed [Act of March 3, 1863, ch. 75, § 30, 12 Stat. 731, 736].

fenses committed by members of the armed forces.[8] A separate article also extended court-martial jurisdiction over the capital crimes of murder and rape committed in peacetime outside the geographical limits of the States or the District of Columbia.[9] In addition, the general article was modified[10] and an exception to mandatory delivery of offenders to civil authorities upon application was created for offenders held pend-

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[8] Article 93. Various crimes—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial shall direct.

[9] Article 92. Murder—Rape—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

In *Lee* v. *Madigan*, 358 U.S. 228, relied on by petitioner (Pet. Br. 10, 22), which arose under this article, the Court construed the statutory language "in time of peace" to bar court-martial trial of a member of the armed forces charged with conspiring to commit murder (in the United States) in June 1949, after cessation of hostilities in World War II, but prior to formal declarations of peace with the belligerents. The Court stated that its construction of the statute (since repealed; see *infra*, pp. 23–24) was based on our "long history" of reluctance to give [military tribunals] authority to try people for nonmilitary offenses" (*id.* at 232). We do not dispute that legislative reluctance. As indicated, it does not, however, measure constitutional power.

[10] The new general article, renumbered Article 96, read as follows:

> Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may

ing a military trial or under sentence for violation of the military articles.[11] See, generally, Duke and Vogel, pp. 451–453.

The provisions of the 1916 articles relating to jurisdiction over non-military offenses remained essentially the same until the enactment of the Uniform Code of Military Justice in 1950, which is presently in effect. The only substantive changes effected by the Code[12] (insofar as pertinent here) were (1) the extension of court-martial jurisdiction in time of peace to the capital offenses of murder and rape committed within the

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be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

The change from the previous general article was to transpose the phrase "to the prejudice of good order and military discipline" to modify only "all disorders and neglects" but not "all crimes or offenses not capital." The purpose of the new article was to include all non-capital offenses not specifically enumerated—a result deemed consistent with the language in *Grafton* v. *United States*, 206 U.S. 333, 348. See Hearing Before the Senate Subcommittee on Military Affairs, an Appendix to S. Rep. No. 130, 64th Cong., 1st Sess., 25, 91.

[11] Article 74. Delivery of Offenders to Civil Authorities—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the State of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused persons to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. * * *"

[12] The principal purpose of the Uniform Code was to overhaul and update court-martial *procedures*.

United States (see 10 U.S.C. 918, 920) and (2) modification of the provision calling for delivery of offenders to civil authorities so as to make such delivery discretionary under such regulations as the Secretary concerned may prescribe (10 U.S.C. 814).

Petitioner misinterprets the early inaction of Congress in the field of legislation of specific articles of war relating to non-military crimes. Rather than any want of power under the Constitution, the history of the articles of war shows an inclination to legislate only as a need arose. At the time of the signing of the Constitution, the strength of the army was but 718 men. Weigley, *History of the United States Army* 566 (1967). As of July 31, 1968, more than a million and a half men were serving in the army both in the United States and abroad. When armies were small and were designed only for times of crisis, the need for specific articles of war setting forth crimes was slight. The general article served sufficiently as a framework to maintain discipline and to protect the rights of servicemen accused of crime. The need for specific articles of war relating to non-military crimes increased, however, with the outbreak of the Civil War and again with the expansion of the army before the First World War. Each time Congress, under its power to make rules for the government and regulation of the armed forces, passed new Articles enlarging court-martial jurisdiction. In similar fashion, Congress permitted much of its regulatory power under the Commerce Clause to remain dormant for a century and longer. Congress did not act to clothe the lower Federal courts with a substantial part of their

jurisdiction, pursuant to the power conferred by Article III of the Constitution, until 1875. See Frankfurter and Landis, *The Business of the Supreme Court* (1928), pp. 65–69. And a similar delay in the exercise of congressional power can be found in the Fourteenth and Fifteenth Amendment areas.

II

CONGRESS HAS REASONABLY FOUND A MILITARY NEED FOR THE JURISDICTION HERE INVOLVED

Court-martial jurisdiction over non-military offenses by servicemen has been recently reviewed by Congress. In 1962 the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary held hearings [18] at which it considered the constitutionality and wisdom of such jurisdiction, concluding that:

> * * * The subcommittee does not favor an outright prohibition of the trial of civil offenses by court-martial, even if the prohibition were to relate only to offenses committed in the United States during peacetime. Such a prohibition would be difficult to administer, might in some instances act to the detriment of the serviceman, and would place an undue burden on military authorities in the performance of their duty to maintain discipline. [Summary-Report of Hearings by the Subcommittee on Constitutional Rights of the Committee on the Judiciary, *Constitutional Rights of Military Personnel*, 88th Cong., 1st Sess. 22–26 (Committee print 1963)].

[18] Hearings pursuant to S. Res. 260 before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, 87th Cong., 2d Sess.

In its review, Congress took into account the manner in which military jurisdiction over non-military crimes has in fact been exercised. With respect to crimes that are also subject to federal civilian prosecution, there has since 1955 been a "Memorandum of Understanding" between the Departments of Justice and Defense.[14] Basically, under this agreement, primary jurisdiction over federal offenses committed on military installations is in the Department of Defense, while primary jurisdiction over federal offenses committed off military installations is in the Department of Justice. Thus, the concurrent military jurisdiction granted by Congress is, in practice, a residual jurisdiction exercised only where the Department of Justice does not act, although the Department of Justice may agree to relinquish its primary jurisdiction in particular cases because of "factors relating to the administration and discipline of the Armed Forces." Similar working arrangements govern the concurrent jurisdiction of the States and the military. Army Regulation 633–1, para. 9 (September 13, 1962) makes it Army policy to deliver members to State and local civilian authorities for trial, upon request, unless the best interests of the service would be prejudiced thereby.[15] In fact, the State and local authorities are more

[14] Implemented by an Army Regulation, AR 22–160 (October 7, 1955); today AR 27–10, c. 7, November 26, 1968.

[15] Procedures for the exercise of criminal jurisdiction over United States forces personnel in overseas areas are contained in the various status of forces agreements between the United States and its allies. The criminal jurisdiction provisions of most of these agreements are patterned after Article VII of the NATO Status of Forces Agreement (Agreement between the parties to the North Atlantic Treaty regarding the status

interested in taking jurisdiction over serious offenses and do so in the great majority of cases.[18]

Congress has had ample reason for concluding that the reasonable interests of the services—and of their

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of their forces (1951), 4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67). Under the article, criminal jurisdiction over offenses punishable by both the law of the host country and United States military law is shared pursuant to a formula whereby the United States military authorities have the primary right to exercise jurisdiction over all *inter se* and official duty offenses, and the foreign authorities have the primary right to exercise jurisdiction over all other concurrent jurisdiction offenses. This formula applies to nearly all of the serious crimes that may be committed by United States servicemen, *e.g.*, murder, rape, robbery, arson, larceny, etc.

Foreign authorities waive their primary right to exercise jurisdiction in most cases. The United States Senate Committee on Armed Services has reported (S. Rep. No. 1630, 90th Cong., 2d Sess., 2–3 (1968)) that during the period December 1, 1966, through November 30, 1967, 21,305 United States servicemen were charged with offenses over which foreign authorities had the primary right to exercise jurisdiction. The foreign authorities waived jurisdiction in 17,988 of these cases, for a worldwide waiver rate of 84 percent. The waiver rate in NATO countries was 93 percent.

Thus, most serious non-military offenses committed by United States military personnel overseas are left to disposition by the United States military authorities in accordance with United States military law. For example, during the period covered in the Senate Report, out of a total of 276 rape cases foreign authorities waived their jurisdiction in 213 cases.

[18] Army statistics show that civil authorities took jurisdiction over about 85 percent of the approximately 5,000 serious offenses committed by Army men off post in 1967. Army statistics further show that, if the rule petitioner seeks had been applied from 1966 to the present, 20 percent of the offenses tried by general court-martial as non-military offenses would not have been tried in military courts and prosecution would have been left exclusively to the civil authorities. Air Force statistics for the period 1956 through 1967 show a somewhat higher figure of 34 percent.

members—justify such court-martial jurisdiction over non-military crimes. The necessity of discipline to a properly functioning army is obvious (see *Orloff* v. *Willoughby*, 345 U.S. 83, 94–95), and offenses off post as well as on duty have an impact upon the general discipline of a military unit. Even more than its interest in the deterrence of its members from transgressions against the civilian community, the military has a strong interest in rehabilitating offending members and retaining them—as much as possible—in the units where they are needed. The reality of these considerations is demonstrated by the fact that the vast majority of the offenses over which the military exercises jurisdiction are misdemeanors, which require neither discharge from the service nor extended incarceration as penalties. The military community has special resources for limited restraint and special training so that both it and its offending members can have, where appropriate, the advantages of punishment less extreme than civilian imprisonment or even probation, which might well be inconsistent with normal military responsibilities. Recognizing these military interests, civil authorities frequently waive jurisdiction over non-military offenses where the military authorities desire to retain the alleged offender in the military community. They would be less likely to do so if that waiver of jurisdiction meant that the offender could not be punished in some suitable manner.

Moreover, establishing exclusive jurisdiction in the civilian courts would be likely to delay the disposition of cases against accused servicemen. It is common knowledge that delays in bringing offenders to trial in

some areas of the country have reached substantial proportions.[17] Such delays would seriously hamper the operation of the armed forces, since an accused serviceman awaiting trial in a civilian jurisdiction could not be transferred and might, therefore, become separated from his military unit or from the vessel or aircraft to which he is assigned.

Petitioner's argument is based on the premise that trial by jury in a civilian court must be deemed preferable to the system created by Congress for the trial of members of the armed forces.[18] We do not underrate the importance of the jury trial guarantee for civilians. See *Duncan* v. *Louisiana*, 391 U.S. 145. The critical determination of "public policy", however, was made by the Framers in expressly exempting cases arising in the land or naval forces from the requirements of the petit and grand jury provisions of the

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[17] An accused serviceman's right to a speedy trial by court-martial is protected by the Uniform Code (10 U.S.C. §§ 810, 833). Statistics gathered by the Army indicate that only 56.9 days, on the average, elapsed in bringing an accused serviceman to trial by general court-martial during the period January 1, 1968, to October 31, 1968.

[18] To the extent that petitioner's argument is premised upon the proposition that the Framers of the Constitution never contemplated that the serviceman committing a non-military offense in a State would be tried in other than a State court where he would be accorded his constitutional right of indictment by grand jury and trial by petit jury (see Pet. Br. 9), it is instructive to note that the Framers rejected a constitutional amendment granting the right to jury trial in State courts (see *Duncan* v. *Louisiana*, 391 U.S. 145, 153). It was only recently that this Court in *Duncan*, *supra*, held the jury trial provision of the Sixth Amendment applicable to the States via the "due process" clause of the Fourteenth Amendment. Even now there is no constitutional right to indictment by grand jury in a State court. *Hurtado* v. *California*, 110 U.S. 516 (1884).

Bill of Rights. Such a determination, with which no court is competent to interfere, needs no "justification" in the ordinary sense. Nevertheless, we point out that sound reasons support the Framers' decision.

Historically, the cornerstone of the jury system was trial of the individual by "twelve of his neighbors and equals" (3 Blackstone, *Commentaries* 379), a concept expressed in modern terminology as "community participation in the determination of guilt or innocence" (*Duncan* v. *Louisiana, supra,* at 156). Juries today may be composed, to be sure, of persons not neighbors of the accused and may sometimes try persons from outside the community who have come there only to commit a crime. Nevertheless the system functions most properly when the jury represents the community where the accused resides (most often the place of his criminal derelictions) and can thus pass a more meaningful moral as well as legal judgment on his actions.

Members of the military are not well situated to enjoy the benefits of this mode of trial in civilian courts. To a significant extent they are separated from the local civilian community. Their real "community" consists primarily of other members of the military forces from all parts of the nation, constantly moving about among a variety of military installations throughout the country. As this Court has recognized (*Orloff* v. *Willoughby,* 345 U.S. 83, 94): "The military constitutes a specialized community governed by a separate discipline from that of the civilian." A

soldier's "peers" are not likely to be persons in the local civilian community, but other members of his military post. Not infrequently local civilian inhabitants may even harbor bias against members of the military stationed in a nearby base in general or against those of a particular ethnic or racial group.

The Framers' decision to exempt military trials from the jury trial guarantee and to leave to Congress the determination of the scope of the jurisdiction (in terms of offenses) to be exercised by courts-martial over servicemen thus has a realistic base. Congress has, as we have shown, implemented that power gradually, using it to its present-day extent only after military needs made it inevitable that persons serving in the armed forces would for the most part be stationed away from their own communities and indeed apart from the civilian community generally. And at the same time Congress has improved the court-martial system to define the rights of those subject to military law, and provide complete institutions and facilities within the military system to secure those rights. *Burns* v. *Wilson*, 346 U.S. 137, 140–142. See, also, the Military Justice Act of 1968, Public Law 90–632, 82 Stat. 1335. The Framers of the Constitution entrusted to Congress the task of defining, within the limits of procedural fairness, the balance to be struck between the rights of men in the armed forces and the overriding demands of discipline and duty. The reasoned congressional judgment in this area must be accepted.

III

PETITIONER WAS IN MILITARY STATUS WHEN HE COMMITTED THE OFFENSES

There is no serious dispute that petitioner was "in the land or naval forces" at the times when the crimes were committed and his court-martial occurred. Compare *Billings* v. *Truesdell*, 321 U.S. 542; *Gibson* v. *United States*, 329 U.S. 338; *Kahn* v. *Anderson*, 255 U.S. 1; *In re Grimley*, 137 U.S. 147. The only apparent basis for an argument to the contrary—that petitioner was on authorized leave when he committed the offenses—is (apart from mention in the Question Presented as a factor bearing on jurisdiction) not relied on by petitioner. Such a contention would, in any event, be insubstantial.

Servicemen on leave do not temporarily lose their military status. Their leave is subject to cancellation at any time and they remain within the full control of the military authorities. The existence of military jurisdiction over persons on leave was upheld in *Hironimus* v. *Durant*, 168 F. 2d 288 (C.A. 4), certiorari denied, 335 U.S. 818, where the defendant's terminal leave was revoked only a few days before her discharge would have become effective, and she was subsequently tried and convicted by court-martial of larceny. The court of appeals, in sustaining court-martial jurisdiction, recognized that military personnel on authorized leave continue by congressional enactment to draw their pay and even accrue leave as does any other person on active duty. See 10 U.S.C. 701(e). Moreover, they retain all other rights and benefits including the protections of the Soldiers and Sailors

Civil Relief Act of 1940 (50 U.S.C. App. §§ 501, *et seq.*). See, also, *Homlitas* v. *United States*, 202 F. Supp. 520, 522 (D. Ore.). The fact that they are on leave, in short, does not change their status as members of the land or naval forces.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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APPENDIX

Instances of Military Punishment for Non-Military Crimes, 1775–1815

There follows a summary of the instances where the military, during the period 1775 through 1815, assumed jurisdiction of apparently non-military criminal offenses committed by military personnel. The General Orders of Washington, Wayne, Wilkinson, as well as the Orderly Books of the Corps of Artillerists and Engineers, and some proceedings available at the National Archives were used as sources. This summary does not purport to represent all of the courts-martial during this period since courts-martial were also convened by regimental commanders; the General Orders of these commanders are generally unavailable.

A. WRITINGS OF WASHINGTON

(Examined for the period from Washington's assumption of command at Cambridge in 1775 until the relinquishment of his commission in 1783)

1. H.Q., Cambridge, July 7, 1775 (Vol. 3, p. 317), "A General Court Martial to sit to morrow, 10 O'Clock A.M. for the Trial of Thomas Raniely, charged with 'stealing' "

2. H.Q., Cambridge, July 29, 1775 (Vol. 3, p. 377). James Foster, Charge: "robbing Dr. Foster, Surgeon of the General Hospital."

3. H.Q., Cambridge, August 21, 1775 (Vol. 3, p. 439). Michael Berry, Charge: "stealing a hat from Capt. Waterman."

4. H.Q., Cambridge, September 24, 1775 (Vol. 3, p. 516). George Hamilton, "soldier in Capt. Dexters Company," Charge: "stealing a blue great coat, the property of Salomon Lanthorp."

5. H.Q., Cambridge, September 28, 1775 (Vol. 3, p. 524). John Hawkins and Robert Higgins, Charge: Theft ("upon appeal from a Regiment Court Martial").

6. H.Q., Cambridge, October 17, 1775 (Vol. 4, p. 35). Lt. Thomas Randell, Charge: "Stabbing a matross in the said regiment."

7. H.Q., New York, May 8, 1776 (Vol. 5, p. 24). Timothy Dawney, Charge: "attempting to stab Joseph Laffin, assaulting John Phipps, and for snapping a loaded musket at Luther Proute."

8. H.Q., New York, May 10, 1776 (Vol. 5, p. 32). Joseph Child of New York Train of Artillery, Charge: "defrauding Christopher Stetson of a dollar," and other charges.

9. H.Q., New York, May 10, 1776 (Vol. 5, p. 32). Zodiac Piper and Thos. Walkins, Charge: "being concern'd in a riot Saturday night."

10. H.Q., New York, May 22, 1776 (Vol. 5, p. 74). Andrew O'Brien, serjeant and William Welch, Corporal, Charge: "assaulting, beating, and dangerously wounding, one William Irvine."

11. H.Q., New York, June 2, 1776 (Vol. 5, p. 95). Hugh Killbreath, of Capt. Rosse's Company, Charge: "assaulting, beating and wounding Assa Baker, and David Avery of the Artillery."

12. H.Q., New York, June 16, 1776 (Vol. 5, p. 106). Lt. Van-Hook, Charge: "beating Sally Paterson, an inhabitant of this town, on the head with a stick."

13. H.Q., New York, July 1, 1776 (Vol. 5, p. 209). William Hurly of Capt. Parks Company, Charge: "firing on and wounding without cause one Peter Child a citizen."

14. H.Q., New York, August 11, 1776 (Vol. 5, p. 411). Joseph Martin of Capt. Hurds Company, Charge: "abusing and robbing a woman in the market."

15. H.Q., New York, August 16, 1776 (Vol. 5, p. 441). David Astin of Col. Sillimans Regiment, Charge: "breaking open a store and stealing rum, molasses and fish."

16. H.Q., Morristown, April 7, 1777 (Vol. 7, p. 365). Lt. Carnes, Charge: "converting to his own use the property—viz: A horse and half Johannes, belonging to one Baxter."

17. H.Q., Morristown, April 17, 1777 (Vol. 7, p. 422). Lt. Costigan, Charge: "pressing a horse, the property of John Kidd Esqr. of Bucks County (Pennsylvannia) appropriating him to his own use."

18. H.Q., Morristown, May 13, 1777 (Vol. 8, p. 59). Serjt. Hyliard, Serjt. Hallbrook, Corporal Smith, Philip Hendrick, and, Stephen Lee, Charge: "suspected of having robbed the house of Elias Bland."

19. H.Q., Morristown, May 13, 1777 (Vol. 8, p. 60). Joseph Bordon, Charge: "theft."

20. H.Q., Middle-Brook, June 13, 1777 (Vol. 8, p. 245). Alexander Brandon, Charge: horse stealing.

21. H.Q., Clove, July 18, 1777 (Vol. 8, p. 424). John Van Dyck, Charge: stealing three hundred dollars and desertion.

22. H.Q., near the Cross Roads, August 17, 1777 (Vol. 9, p. 88). Capt. Holmes, Charge: "Going into one Palmer's garden, tearing cucumbers from the vines and abusing and striking Dr. Smith."

23. H.Q., Valley Forge, January 28, 1778 (Vol. 10,

p. 3[illegible] William Dearlove, Charge: "stealing money from Frederick Buzzard." Stephen Rice, Charge: "plundering the inhabitants of the county."

24. H.Q., Valley Forge, March 14, 1778 (Vol. 11, p. 83). Lieutt. Enslin, Charge: "Attempting to commit sodomy with John Monhort a soldier & swearing to false accounts."

25. H.Q., Valley Forge, March 23, 1778 (Vol. 11, p. 133). Sgt. John Henry Leiders, Charge: "wounding with his sword one Henry Trautcher."

26. H.Q., Valley Forge, April 16, 1778 (Vol. 11, p. 266). Lieutt. Orr, Charge: "conniving with Serjeant Hughes in secreting stolen goods" and other charges.

27. H.Q., Valley Forge, May 29, 1778 (Vol. 11, p. 486). Captain Medaras, Charge: Forgery.

28. H.Q., Valley Forge, June 5, 1778 (Vol. 12, p. 22). Lieutt. McDonnald, Charge: "taking two mares and a barrel of carpenter tools on the lines which mares he conveyed away and sold the tools at a private sale."

29. H.Q., Valley Forge, June 13, 1778 (Vol. 12, p. 54). Captain Henderson, Charge: "extorting a sum of money from Alexander Bayard an inhabitant of this state."

30. H.Q. Peramus, July 12, 1778 (Vol. 12, p. 172). Lieutt. West, Charge: "plundering the house of Mrs. Golf."

31. H.Q., White Plains, July 27, 1778 (Vol. 12, p. 242). Mrs. James Davidson, Quarter Master, Charge: "defrauding the soldiers," "em ezzling Continental Property and disposing of several Articles belonging to the United States."

32. H.Q., White Plains, August 8, 1778 (Vol. 12, p. 299). John Armstrong, a Private, Charge: "stealing a key."

33. H.Q., White Plains, August 31, 1778 (Vol. 12,

p. 375). Captain Ewell, Charge: "embezzling money the property of several soldiers" and "embezzling Cloathing belonging to the Public."

34. H.Q., White Plains, September 9, 1778 (Vol. 12, p. 415). Samuel Bond, Charge: "Picking a lock and breaking into a public store," and stealing.

35. H.Q., Frederickburgh, October 23, 1778 (Vol. 13, p. 136). Hate-evil Colston of Col. Nixon's Regiment, Charge: "entering the house of Rueben Crosly an Inhabitant of Frederick's burgh, by force of arms in company with one more, and taking from thence about three hundred dollars in Continental Money, one Musquet, one pair of plated Shoebuckles and sundry other articles."

36. H.Q., Fredericksburgh, October 23, 1778 (Vol. 13, p. 137). Glover, Goldsmith, and Lamb, soldiers, Charge: "plundering house of Daniel Burch of some Cash, sundry articles of wearing Appearl and Household Furniture." Glover was also charged with "stealing from inhabitants whilst encamped at White Plains & stealing from inhabitants on the march."

37. H.Q., Fredericksburgh, October 23, 1778 (Vol. 13, p. 138). Brown, Herrick, Herring, Walton, Charge: several specifications of breaking and robbing homes.

38. H.Q., Middle Brook, February 11, 1779 (Vol. 14, p. 99). Colo. Craige, Charge: "beating and otherwise illtreating Caleb Brokaw an Inhabitant of this state."

39. H.Q., Middle Brook, February 17, 1779 (Vol. 14, p. 102). Lieutenant William Jenkins, Charge: "embezzling public property."

40. H.Q., Middle Brook, April 22, 1779 (Vol. 14, p. 424). Zimmerman, Serjeant; Gray, Private; Fisher, Farrier; Lankford, Private; and Garner, Private; Charge: "commiting sundry robberies on the good people of the United States."

41. H.Q., Middle Brook, May [illegible]8, 1779 (Vol. 15, p. 100). Carson, Garnick, Cane, Johnston, Hitchcock, Charge: "breaking into and robbing the house of Mr. Van Noorstrand an inhabitant."

42. H.Q., Camp Middle Brook, May 22, 1779 (Vol. 15, p. 131). Edward Hawkins, soldier, Charge: "attempting to fire on an inhabitant in the night" and other charges.

43. H.Q., Middle Brook, May 27, 1779 (Vol. 15, p. 163). Roger Finney, William Martin, Charge: "housebreaking & robbery."

44. H.Q., Middle Brook, May 30, 1779 (Vol. 15, p. 183). William Mackarun, soldier, Charge: "stealing horseshoes."

45. H.Q., Middle Brook, June 1, 1779 (Vol. 15, p. 207). William Scully, soldier, Charge: "entering forcibly into the house of Robert Dennis and robbing him of sundry goods, also stabbing William Cox with a bayonet."

46. H.Q., Moore's House, November 19, 1779 (Vol. 17, p. 137). Borough and Burges Rickets and Mullen as accessories; Charge: "assaulting the horse by shooting . . . robbing the owner . . . plundering his house."

47. H.Q., Morristown, January 3, 1780 (Vol. 17, p. 345). John Lewis, a soldier, Charge: "Stealing and being drunk on duty."

48. H.Q., Morristown, February 19, 1780 (Vol. 18, p. 34). Lieutenant Porter, Charge: "Unofficer, unsoldierlike, and villainous conduct upon Staten Island viz: robbing and plundering a woman of money."

49. H.Q., Morristown, March 13, 1780 (Vol. 18, p. 110). Bell, Powers, Brown, Justice, soldiers; Charge: "Plundering Mr. Bogart an Inhabitant near Paramus."

50. H.Q., Morristown, May 28, 1780 (Vol. 18, p.

434). Fry, Charge: "stealing beef, candles, rum, and meal."

51. H.Q., Pracahess, July 22, 1780 (Vol. 19, p. 224). Thomas Brown, Charge: "plundering the inhabitants" and "abusing a woman."

52. H.Q., Orangetown, August 14, 1780 (Vol. 19, p. 371). Henry Finn of Colonel Angell's regiment, Charge: "plundering the inhabitants" and "abusing a woman."

53. H.Q., Orangetown, August 20, 1780 (Vol. 19, p. 414). Jesse Hensley and Michael Bourk of the 4th Regiment of Light Dragoons, Charge: "Robbing the house of the widow Sarah Sanford."

54. H.Q., Tean Neck, August 29, 1780 (Vol. 19, p. 467). Philip Lankfitt and Richard Peters, Charge: "Robbing Joseph Wessells of sundry articles in the presence of said Wessell's wife."

55. H.Q., Steenrapia, September 12, 1780 (Vol. 20, p. 33). David Hall, a soldier, Charge: "Plundering an inhabitant of money and plate."

56. H.Q., Orangetown, September 27, 1780 (Vol. 20, p. 96). Rooney, Moore, Miller, Welch, soldiers, Charge: robbery.

57. H.Q., Totowa, October 13, 1780 (Vol. 20, p. 179). David Gamble, Charge: "possession of counterfeit money and desertion."

58. H.Q., NewWindsor, February 18, 1781 (Vol. 21, p. 240). Major Reid, Charge: embezzling public property and other charges.

59. H.Q., near York, October 30, 1781 (Vol. 23, p. 301). Gilbert Otter, soldier, Charge: "Not doing his duty as a Centinel and with assisting robbing a french officer's Wagon."

60. H.Q., Newburgh, January 28, 1783 (Vol. 26, p. 73). Cowell, Shea, Jenks, Blake, Creaton, Curtis, Urann, Cook, Woods, Goodrich, Charge: killing a cow, stealing fowls, and stealing geese.

61. H.Q., near York, November 3, 1781 (Vol. 23, p. 320). William Timmans, Charge: "Marauding, and burning the houses of different inhabitants of State of Maryland".

62. H.Q., near York, November 3, 1781 (Vol. 23, p. 322). Abraham Erwin, Charge: "Marauding in one of the barges in Chesapeak bay," and other charges.

63. H.Q., near York, November 3, 1781 (Vol. 23, p. 323). Sgt. Selkirk and James Steel, Charge: "robbing a french officer's wagon at Yorktown."

64. H.Q., Verplanks Point, September 13, 1782 (Vol. 25, p. 155). Ensign Bloodgood, Charge: "taking money out of the drawer in the barroom of the widow Charity Jacobus in a clandestine manner" and failing to clear his reputation among the officers of his regiment when charged with the same.

65. H.Q., Verplanks Point, October 11, 1782 (Vol. 25, p. 252). William Taylor, soldier, Charge: desertion and forgery.

66. H.Q., Newburgh, November 23, 1782 (Vol. 25, p. 368). John Abel, John Cogden and Philip King, soldiers, Charge: "being out of camp at an unreasonable hour and killing an ox belonging to an inhabitant."

67. H.Q., Newburgh, February 21, 1783 (Vol. 26, p. 149). Major Reid, Charge: Defrauding the United States and "embezzling public money."

68. H.Q., Newburgh, March 1, 1783 (Vol. 26, p. 174). Ensign James Sawyer, Charge: assault and robbery of a fellow officer and other charges.

69. H.Q., Friday, March 7, 1783 (Vol. 26, p. 197). Lt. Freeman, Charge: assault upon and theft from a fellow officer.

70. H.Q., Newburgh, April 15, 1783 (Vol. 26, pp. 321, 322). Ensign Herring, Charge: Embezzling public funds and stealing shirts from the common store.

(All of the entries in the Orderly Books of Major Gen. Anthony Wayne, except for the period Nov. 17, 1792 to April 11, 1793, have been printed in 34 Mich. Pion. & Hist. Coll. 341. In the references that follow, page numbers refer to the printed portions.)

71. "Hugh M. Laughlin a Soldier belonging to the Legion of the United States"; H.Q. Pittsburgh, 12 August 1792 (p. 360). Charge: "for Desertion and for stealing a horse from the widow Duncan." Findings: "Guilty of both charges". Sentence: "to suffer death." Action: "confirms the foregoing sentence and directs it to take place tomorrow morning between the hours of eight and nine."

72. Sergeant Hopkins, H.Q. Pittsburgh, 11 November 1792 (p. 403). Charge: "For riotously beating a woman kept by him as a mistress", & other charges growing out of the apprehension. Findings: Guilty, Sentence: "to be reduced to the ranks."

73. Sergeant James McGarvin, H.Q. Hobson's Choice, 31 July 1793 (p. 460). Charges: "for absenting himself from Camp, without leave and Rioting at late hours in the town of Cincinnati", and other charges.

74. "George Gaull a Private of the Garrison of Fort Washington" H.Q. GreenVille, 23 May 1794 (p. 510). Charges: "leaving his Guard on the night of the 7th December 1793 and with attempting to break open and enter into, and rob the store of Mr. Silver, trader at Cincinnati on the same night." Findings: Guilty. Sentence: one hundred lashes. Lorin Jones and Henry Goodrich were tried as accessories and acquitted.

75. "T. Sergeant & Stephen Ogden of the 1st Sub Legion," H.Q. 15 June 1794 (p. 519). Charges: "the robbing (or being accessary) of a store at this place,

kept by the agent of Mr. Samuel Creigh of Cincinnati, and taking therefrom the good of said Creigh to the amount of Twenty Pounds. Findings: Guilty. Sentence: One hundred lashes and restitution. Action: Approved. Two others were also charged, and tried; one was acquitted the other received the same sentence.

76. Ephraim Baker & Archibald McDonald, H.Q. GreenVille, 28 Sept. 1795 (p. 646). Charges: Desertion, selling and disposing of their uniform and clothing, and "stealing a horse, the property of a citizen." Findings: Guilty. Sentence: Death. Action: Approved, later remitted.

77. Malthias Gibbs, H.Q. GreenVille, 19 March 1796 (p. 686). Charges: "Stealing the horse of a friendly Indian." Fndings: "guilty of taking though not of stealing". Sentence: fifty lashes.

C. GENERAL JAMES WILKINSON'S ORDER BOOK, DEC. 31, 1798, MARCH 8, 1808

(Available on microfilm at the National Archives)

78. "Sergeant Major Montgomery of the third Regiment" ", H.Q. Fort Adams, 21 May 180[illegible] (p. 243). Charges: "For combining with other persons at present unknown to take from the Main Guard of the Camp on the night of the 18th instant a certain David Tero being then and there a prisoner and after removing said, Tero some distance from the guard for aiding and abeting (sic) other persons as yet unknown & under cover of the night in a most cruel and dastardly manner to beat, abuse, & maltreat the said Tero even to the danger of his life all which is contrary to good order and discipline, disgraceful to the profefsion (sic) of Arms and Scandalous & infamous . . ." Findings: Guilty. Sentence: "to be reduced to the ranks and to receive one hundred lashes." Ac-

tion: "The General approves the Sentence & directs that the prisoner be stript of his side Arms & Epuletts (sic) & flogged on the grand parade this evening at roll call, but as he is to be summomedend (sic) to the Civil Authority for further punishment and as it is strongly to be presumed from the tenor of the testimony adduced that he has acted the orders of a Commissioned Officer the General thinks proper to remit the corporal punishment to twenty five lashes."

79. "Lieut Wm P. Smith of the 3d Regiment" H.Q. Fort Adams, 23 May 1800 (p. 244). Charges: "First—For usurping authority to make a detachment from a line, on the night of the 18th instant and in . . . violation of the Order of the immediate Commanding Officer of the Post, to employ said detachment to seize and force a Citizen from his Quarters, and to conduct him to the Main Guard of the Camp, to the prejudice of good order, and Military discipline . . ." Second—for beating and abusing the citizen and other charges. Findings: Guilty. Sentence: Three months suspended from command, total forfeitures for three months.

80. "John Smith a private" H.Q. 3 May 1801 (p. 323). Charges: "in absenting himself from the Garrison, on the 30th of April last without permission, also with stealing the property of a citizen in the town of Pittsburgh & beating & abusing Richard Savage when detected with the property." Findings: Guilty. Sentence: "to receive ninety-nine lashes, his head to be shaved, tarred and feathered, drummed out of the Garrison with a halter around his neck, and rendered incapable of ever serving the United States."

81. Lieut Samuel Foiole, H.Q. Pittsburgh, 10 July 1801 (p. 340). Charges: Conduct unbecoming by "securing to his own use a log of Mahogany & other wood being part of the cargo floated from the ship Argus, which was sometime since wrecked near the harbor of

Charleston." Conduct unbecoming by "fraudulently keeping the above named articles, and not accounting with the consignees of the above mentioned ship . . ." and other charges centering around the abuse of his office. Findings: Not guilty of securing the logs in a manner unbecoming but guilty of fraudulently keeping the property, not guilty of some but guilty of other charges. Sentence: To be suspended from command for three months with total forfeitures for the same period. Action: approved.

82. Barney Keith, H.Q. Fort Wilkinson, 17 May 1802 (p. 387). Charges: Desertion and stealing a horse the property of Lieut. Jones. Findings: Guilty. Sentence: one hundred lashes at four different times.

83. William Walls, H.Q. Fort Wilkinson, 16 July 1802 (p. 392). Charges: "stealing horses the property of certain Indians, and traders belonging to the Creek Nation and with an intention to desert from the service of the United States." Findings: "Guilty of stealing one horse the property of Thos. Carr an Indian & two other horses the property of a person or persons unknown." Sentence: To receive one-hundred lashes and to perform hard labor "attached by leg to an iron chain and a 5½ inch shell loaded with lead or an equiv in weight, to have his head shaved and to be confined to the guard house every night, during the remainder of his term of service and on the day of its expiration to be drummed out with a Straw Halter round his neck, as unworthy to serve in the Army of the U.S., & further that four fifths of his pay monthly for the residue of his term of service to be stopt & paid to the hands of the principal agent for Indian affairs or to his order for the purpose of reimbursing the persons injured."

84. Lieutenant Woolstoncraft, H.Q., New Orleans, 16 March 1804 (p. 462). Charges: A number of speci-

fications of disobedience and neglect of duty, and a number of specifications of scandalous and infamous conduct including "suffering a prostitute woman to stay on Garrison several days & nights" allowing a prostituted woman to go on the Garrison parade, living in common with her, and lastly, with shooting and killing certain ducks the property of a Major. Findings: Not Guilty.

85. Major George Ingersoll, H.Q. Washington, 5 July 1804 (p. 479). Tried at Frederick, Md. 7 Dec. 1803. Charges: I Embezzlement of public property, two specifications, "cutting & converting to his own use for Fuel, Timber the property of the United States" and "converting Red House on Governors island into a Hen House." II Fraud, two specifications. III False muster, IV Disobedience of Orders, two specifications, alleging violations of certain orders about rations for servants. V. Scandalous and infamous conduct, five specifications; overcharging the Government for milk that he sold, selling vegetables to the Army which were raised on Government property, overcharging for the sale of potatoes, taking float wood from Government property, making false statements. Additional charge: Punishing men without giving them a court-martial. Findings: Guilty only of the additional charge.

86. Joseph Bland, H.Q. Frederick Town, 1804 (p. 491). Charges: Desertion and stealing money from a Lieutenant. Findings: Guilty. Sentence: One-hundred lashes, to reimburse $495, and hard labor for the remainder of his term of service.

87. Captain Hugh McCall, H.Q. Washington, 30 Nov. 1804 (p. 504). Charges: "living publically with a woman of infamous character in his quarters within the Garrison" and other charges. Findings: Guilty. Sentence: Suspended from command for two years. Action: Rehearing on sentence.

88. Christopher Forrester, H.Q. Natchitoches, 28 Sept. 1806, (p. 607). Charges: "Absenting himself from the Garrison, also robbing a citizen of sundry articles of wearing apparel." Findings: Guilty of the first but not guilty of robbing.

89. Lieutenant Stephen Warrel, H.Q. Natchitoches, 1 Oct. 1806 (p. 610). Charges: Shooting at a ship without reason, boarding and abusing the master. Findings: Not guilty.

90. Lieutenant William P. Clyma, H.Q. New Orleans, 27 Jan. 1807 (p. 689). Charges: "Charge 1st For conduct unbecoming an Office & a Gentleman." "Specification For being drunk, raising a riot, drawing a Dirk and attempting to stab a Citizen at the Public Ball on the night of the 28th December 1806." and other charges, of repeated drunkenness and neglect of duty. Findings: Not guilty of the first charge.

91. James Dawson, H.Q. New Orleans, 27 Jan. 1807 (p. 691). Charged: AWOL and "[illegible]ting in the city with Sailors and not returning until Tattoo." Findings: Not guilty.

92. Sergeant Cobb, H.Q., New Orleans, 17 March 1807 (p. 720). Charge: Forging the name of a military agent. Findings: Not guilty.

93. Lieutenant Williamson, H.Q., New Orleans, 24 March 1807 (p. 729). Charges: Conduct unbecoming, by keeping company with non-commissioned officers and drinking with them on a certain evening; by riding to a tavern in the afternoon with a common prostitute; by ordering a Sergeant to make a false report about the Lt. status. He was charged with an additional charge of 1. seducing others of desert; 2. "creating a riot at a Ball in Staunton, Virginia.' Findings: Guilty of all except the first part of the additional charges. Sentence: To be dismissed from the service.

94. Christopher Brandgan, H.Q., New Orleans, 12

May 1807, (p. 757). Charge: "Stealing a needle book containing five dollars and several other articles on the night of the 26th April and selling them." Findings: Not guilty.

D. ORDERLY BOOKS OF THE CORPS OF ARTILLERISTS AND ENGINEERS

(Four volumes entitled as above are in the Library of the United States Military Academy at West Point, New York. The entries run from May 7, 1795, to May 19, 1799.)

95. October 5, 1795, West Point Sgt. Harris was tried on the charge of "beating a Mr. Williams an inhabitant living near this garrison" (Book 1, pp. 157, 158, 159). Findings: "they do acquit him."

96. July 5, 1796, West Point, John Kelly, Private, charged with "abusing and using violence on Mrs. Cronkhyte, a citizen of the United States." He was found guilty and sentenced to receive seventy-five lashes (Book 3, pp. 45, 46).

97. October 13, 1796, West Point, Thomas Duncan and Samuel Moore charged with being absent from camp without leave and "marrauding upon the inhabitants." Findings: Guilty. Sentence: "to labor fifteen days "and that the sume of one dollar be stopted from the pay of each."

98. February 23, 1799, West Point, Jeremiah Gillam, Nathanel Thatcher, John Forde, Thomas Cahart, Humphrey Fagin and Andrew Mitchell, privates, charged "with stealing poultry on the night of the 20th inst. from the house of John Warren & for being absent after tattoo with out leave." Findings: Humphrey Fagin—Guilty—Sentenced twenty-five lashes and "to undergo stoppages . . . of Eleven dollars twenty-five cents; Jerimiah Gillim—Guilty to receive 25 lashes others acquitted."

E. THE PROCEEDINGS OF COURT-MARTIAL, WAR OFFICE

(A series of large M.S. folio volumes in the National Archives providing the proceedings of certain but not all courts-martial of officers from 1808 through 1815.)

99. Columbian Springs, 20 May 1809, (Vol. II, p. 90). Isiah Doane, Charge: "Ungentlemanly conduct in fight at fisticuffs with his servants at Burlington about 20th day of December AD 1808," and other charges. Findings: Acquitted of this charge but guilty of others. Sentence: to be dismissed.

100. Fort Independance, 24 May 1809 (Vol. II, p. 146). Allen G. Cushmen, Charge: Conduct unbecoming an officer, spec 1., "Ill usage of Mrs. Matheson, wife of a private . . ." spec. 2., "coming into the officers room . . . drawing a (knife) which he had kept concealed and threatening to stab some of his company," and other charges. Findings: Guilty. Sentence: Cashiered.

101. Fort Powhatan, 22 November 1809 (Vol. II, p. 395). Alex L. Walker, Charge: "Resisting the civil authority" spec. 1. "In drawing his sword on the sheriff of Wythe County and making his escape on or about the 25th Jan 1809." Conduct unbecoming in taking a horse belonging to Charles Lewis and disposing of the horse to his own profit, and other charges. Findings: Guilty. Sentence: Cashiered.

102. Carlisle Barracks, 8 December 1809 (Vol. II, p. 310). Ensign Neal Shaw, Charge: "savagely and cowardly attacking and breaking Cornet Haxton," and other charges. Findings: Guilty. Sentence: Reprimand.

103. Cantonment, Washington, April 24, 1810 (Vol. 3, p. 1), Surgeon's Mate William C. Smith,
Charge: "going to a civilian's house and raising a riot with the family, abusing wife and daughter,"

and other charges. Findings: Guilty. Sentence: to be dismissed.

104. Fort Fayette, 26 January 1811 (Vol. 3, p. 306). 2 Lt. Jacob Sinn, Charge: "Paying his bill in a civilian restaurant with a worthless bank bill." An additional charge of "gambling with a citizen of Pittsburgh and cheating." Findings: Guilty. Sentence: To be dismissed.

105. Fort Moultine, August 14, 1812 (Vol. 4, p. 328). Cpt. James McHelvey, Charge: Conduct unbecoming by "being drunk at Mr. Picteos Beef stake House," and being drunk at one of the common brothels. Findings: Guilty. Sentence: Dismissed.

106. Cantonment Belle Fontaine, 1 March 1813 (Vol. 5, p. 51). Cpt. Joseph Crofs, Charge: "clandestinely taking & stealing Ensign John A. Shaw's pocket book . . . at St. Louis." Findings: Guilty of a lesser offense. Sentence: Dismissed.

107. Greenbush Cantonment, 10 October 1813 (Vol. 5, p. 271). Lt. John Frarier, Charge: ". . . at the house or shop of one Thompson he insulted and abused him," and using "threatening language to citizens." Findings: Guilty. Sentence: Dismissed.

108. Nashville, Tenn., 20 April 1814 (Vol. 6, p. 113). 2 Lt. E. B. Billings, Charge: "perjury to a district court judge in Tenn." and "ungentlemanly conduct in court of Davidson County, Tenn.," also charged with defrauding the United States and other charges. Findings: Guilty. Sentence: Dismissed.

109. Greenbush Cantonment, 12 August 1814 (Vol. 6, p. 263). Lt. H. T. Sommons, Charge: "assault on a citizen," "disrespectful to a citizen in his own house," "striking a citizen at his home," and "disrespectful & insulting language to a citizen while on a march," and other charges. Findings: Guilty. Sentence: To be dismissed.

110. Portland, Me., 14 November 1814 (Vol. 6, p. 372). Col. Joseph D. Learned, Charge: "fraud and embezzlement of public monies, defrauding a civilian, and making false statements to a civilian with reference to the amount he was authorized to pay." Findings: Guilty. Sentence: Cashiered and publish the results of trial.

111. Savannah, 8 February 1815 (Vol. I, p. 12). Cpt. David C. Twiggs, Charge: "near Camp Huger, went to house of William Brotot & beat & ill-treated him," and other charges. Findings: Not guilty of the principle charge; guilty of other charges. Sentence: Suspended from service for six months and pay stopped for six months.

112. Savannah, 10 February 1815 (Vol. I, p. 33). Cpt. Felix B. Warley, Charge: signing a false libel against another officer. Defendant moved to dismiss on the grounds that "he was likewise indicted in civil courts." His motion was denied. Findings: Guilty. Sentence: Suspended for one month.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 646

JAMES F. O'CALLAHAN,

Petitioner,

against

J. J. PARKER, Warden, United States Penitentiary, Lewisburg, Pennsylvania,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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INDEX

SUBJECT INDEX

	Page
REPLY BRIEF FOR PETITIONER	
Argument	1
Conclusion	8

TABLE OF AUTHORITIES

CITATIONS:

Caldwell v. *Parker*, 252 U.S. 376	4
Coleman v. *Tennessee*, 97 U.S. 509	2, 4
Duncan v. *Kahanamoku*, 327 U.S. 304	2
Ex parte Mason, 105 U.S. 696	3, 5
Ex parte Milligan, 4 Wall. (71 U.S.) 2	4
Kinsella v. *Singleton*, 361 U.S. 234	2
Lee v. *Madigan*, 358 U.S. 228	2
McElroy v. *Guagliardo*, 361 U.S. 281	4, 5, 6, 8
Reid v. *Covert*, 354 U.S. 1	2, 4, 7, 8
Toth v. *Quarles*, 350 U.S. 11	2

CONSTITUTIONAL PROVISION:

Article I, §8, Cl. 14	1, 4

STATUTES:

Article XVII of the Articles for the Better Government of the Navy (Act of April 23, 1800, Ch. 33, 2 Stat. 45)	5, 6
American Articles of War of 1775	7

	Page
British Articles of War of 1712	7
British Articles of War of 1765	7
Mutiny Acts of 1720 and 1721	7
Mutiny Act of 1803	7
OTHER AUTHORITIES:	
1 Blackstone's Commentaries	7
Winthrop, *Military Law and Precedents* (1886 ed.)	4
Winthrop, *Military Law and Precedents* (1896 ed.)	4
Winthrop, *Military Law and Precedents* (1920 ed.)	4

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ARGUMENT

The respondent's argument that court-martial jurisdiction is unlimited as to offenses incorrectly assumes that the power granted Congress in Art. I, §8, Cl. 14 is a broad authority to subject any one having the proper "status" to the jurisdiction of military tribunals.

The case is otherwise. The power of Congress to establish court-martial jurisdiction, unlike the powers of Con-

gress respecting interstate commerce and federal court jurisdiction to which it has been analogized by respondent (Res. Br. 24-25), is "very limited and extraordinary." *Reid* v. *Covert*, 354 U.S. 1, 21; *Kinsella* v. *Singleton*, 361 U.S. 234, 240. The jurisdiction of military tribunals "at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law." *Ibid.*[1]

Respondent concedes that the question presented by this case has never been squarely raised or decided by this Court. Respondent's argument is based almost entirely on dicta from cases in which the issue considered by the Court was jurisdiction over the person; this case involves jurisdiction over the offense, an issue not discussed by Court or counsel in cases cited at pages 8-11 of respondent's brief. It would be unusual indeed to base such a broad grant of power to the military on a few casual words of this court.[2]

As this Court has frequently pointed out, a principal concern of the Founders was with the preservation of civilian supremacy over the military and with the historic rights of the criminally accused to trial before an impartial civilian court, by a civilian jury and with full due process safeguards. It is inconceivable therefore, that the Founders intended to incorporate into the Constitutional design, the power to extend military jurisdiction as widely as is here asserted by the respondent.

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[1] See also *Toth* v. *Quarles*, 350 U.S. 11, 23; *Lee* v. *Madigan*, 358 U.S. 228, 232-235; *Duncan* v. *Kahanamoku*, 327 U.S. 304, 307, 318; *Coleman* v. *Tennessee*, 97 U.S. 509, 514.

[2] *Coleman* v. *Tennessee*, *supra*, may be an exception to these remarks in that the Court did consider, in part, jurisdiction over the offense. See petitioner's original brief, pages 21-22.

Contrary to respondent's assertion, history does not support his position. The examples of American military practice during and just after the Revolutionary War set forth in the lengthy appendix to respondent's brief are ambiguous and at best inconclusive. While we have been unable to check each entry closely or examine the primary source material because of the press of time, it is nevertheless clear that substantially all of the entries are on their face either irrelevant or, in many instances, supportive of petitioner's position. As to none of the instances cited do we know whether the accused was on duty at the time of the offense charged or whether the civilian courts were open. In many of the cases cited the offenses charged seem to be typical military crimes and/or offenses committed while on duty.[3] The large majority of cases cited were during periods of war.[4] Others, dated between 1783 and 1812, appear from the nature and place of the offense to have been committed during service on the frontier against the Indians where an informal state of war existed.[5] We agree that in such circumstances prosecutions under the so-called "general article" are—aside from other constitutional objections—historically supported. Such an assertion of court-martial jurisdiction is not inconsistent with our position that court-martial jurisdiction may not extend to conduct having no relation to the military other than the fact that it was committed by a man in uniform. See *Ex parte Mason*, 105 U.S. 696, which we discuss in our main brief at pp. 22-23, 25-26.

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[3] See instances of military punishment listed in appendix to respondent's brief, Nos. 21, 28, 31, 33, 47, 57, 59, 65, 66, 68, 69, 70, 73, 74, 76, 78, 79, 80, 82, 85, 86, 87, 88, 91, 97.

[4] Nos. 1-70 inclusive, 105-112 inclusive.

[5] See Nos. 71-77 inclusive, 80, 82, 83.

Winthrop[6] declares without qualification that the general article—which has been incorporated in all British and American Articles of War—does not encompass crimes "committed upon or against civilians, and not at or near a military camp or post, or in breach or violation of a military duty or order." Such crimes are not to be "regarded as within the description of the Article, but are to be treated as civil rather than military offenses." [Footnote omitted][7] See also *Caldwell* v. *Parker*, 252 U.S. 376, 383; 2 Winthrop, *Military Law and Precedents*, 1122-1123 (1896 ed.).

It was only in such circumstances of wartime, marching armies, and closed or inaccessible civil courts in which court-martial jurisdiction has been extended to reach civilians and civilian offenses committed by members of the military. See Pet. Br. 16-18; *Coleman* v. *Tennessee*, *supra*; *Ex parte Milligan*, 4 Wall. (71 U.S.) 2; *Reid* v. *Covert*, *supra*, at 33-35.[8]

As this Court held in *McElroy* v. *Guagliardo*, 361 U.S. 281, 285, examples based on the "legal concept of troops

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[6] Winthrop, *Military Law and Precedents*, 724 (1920 ed.).

[7] It is true, as Winthrop observes, that "[a] strict rule on this subject, however, has not been observed in practice; and especially as the civil courts do not readily take cognizance of crimes committed by soldiers. . . ." Winthrop, 2 *Military Law and Precedents* (1886 ed.) 1042. As an example Winthrop states that "jurisdiction has not unfrequently been sustained where the offense was committed upon a civilian or an Indian upon a military reservation, or at or in the immediate vicinity of a remote military outpost, or elsewhere where civilian justice could not readily be exercised." *Id.* at 1042 n.1.

[8] *Reid* v. *Covert*, *supra*, at 33, indicates that the authority for expansion of court-martial jurisdiction in time of war may derive not from Art. I, §8, Cl. 14, but from the President's implied war powers independently of Congressional authorization.

'being in the field'" are inapposite to the issue raised by cases such as the instant one.

The amendment to the general article in the Articles of War of 1776 (Res. Br. 14-15) authorizing commanding officers "in quarters, garrisons, or on a march" to exercise summary power to redress "abuses and disorders which may be committed by any officer or soldier under his command" accentuates the limited and appropriate scope of the general article.

Respondent's analysis of the article mandating the delivery of offenders to civil authorities (Res. Br. 15) again misses the point. Criminal conduct, even of a kind directly related to military operations, may subject the offender to concurrent civil and military jurisdiction. *Ex parte Mason, supra.* But this is not such a case—the criminal conduct of the kind involved here has never been considered within the scope of the general article.*

Respondent also relies on Art. XVII of the Articles for the Better Government of the Navy (Act of April 23, 1800, Ch. 33, 2 Stat. 45, 47). (Res. Br. 15-16.) This Court has noted, however, the unique exigencies of naval life which make precedents of naval court-martial jurisdiction "entirely inapposite" to cases such as the present. See *McElroy* v. *Guagliardo,* 361 U.S. 281, 284-285.

There are further points to be considered regarding Art. XVII. The first is that Art. XVII is, to say the least, ambiguous; our reading would indicate that the word

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* As we have shown in Point II of our original brief, the residual jurisdiction of the military, where it is properly exercised, extends only to the military aspects of an offense, not to the substantive civil crime.

"offenses" refers only to desertion.[10] Further, the "on shore" reference does not indicate whether it meant foreign or United States territory. An interpretation of that term consistent with history would limit the jurisdiction to offenses committed on foreign territory, since "from time immemorial the law of the sea has placed the power of disciplinary action in the commander of the ship when at sea or in a foreign port." *McElroy* v. *Guagliardo, supra* at 285.

In contrast to the respondent, this Court has found the British historical background presented by petitioner (Pet. Br. 15-19) highly relevant as demonstrating the Founders' intent to limit court-martial jurisdiction to its narrowest degree. This history does not show merely, as respondent simplistically contends, "that Parliament did not trust the Crown" to make the determination of which offenses by members of the armed forces should be subject to trial by courts-martial and that there was a "long-standing dispute as to which of them might establish military law within the realm in time of peace." (Res. Br. 16-17.) This strug-

[10] Art. XVII in its entirety reads:

"If any person in the navy shall desert, or shall entice others to desert, he shall suffer death or such other punishment as a court martial shall adjudge, and if any officer or other person belonging to the navy shall receive or entertain any deserter from any other vessel of the navy, knowing him to be such, and shall not, with all convenient speed, give notice of such desertet to the commander of the vessel to which he belongs, or to the commander-in-chief, or to the commander of the squadron, he shall on conviction thereof, be cashiered or be punished at the discretion of a court-martial. All offenses committed by persons belonging to the navy while on shore, shall be punished in the same manner as if they had been committed at sea." See further, Harwood, *Naval Courts-Martial*, 17-18 (1867) which suggests that the "on shore" provision was enacted to fill a jurisdictional gap to cover naval yards and installations.

gle, as this Court has noted and as the Founders knew it, was of constitutional proportions involving the right of every citizen to trial by jury and the maintenance of the integrity of civilian government against martial rule. *Reid* v. *Covert, supra* at 23-27, 29-30; see also 1 Blackstone's Commentaries 413. The Founders were obviously aware from first hand experience that military oppression could be authorized by the legislature as well as the executive; the Constitution was designed to protect civil supremacy, not merely shift the power of oppression from one branch of government to another. *Reid* v. *Covert, supra* at 28-30.

Respondent's discussion of the British Articles of War of 1712 and the Mutiny Acts of 1720 and 1721 (Res. Br. 18-19) is irrelevant to this case. Beginning with the very early courts of Constable and Marshall, as we have noted, the jurisdiction of military tribunals and soldiers in territories "beyond the seas" where the jurisdiction of the Civil Courts of England did not extend, was plenary. See Pet. Br. 17 n.10. This, of course, has nothing to do with our case where the civilian courts were open and capable of exercising jurisdiction.

More to the point is the fact that none of the statutes cited by respondent nor the British Articles of War of 1765, from which the American Articles of War of 1775 were directly drawn, authorized the court-martial jurisdiction over non-military offenses committed in England when the civilian courts were open.[11] See Pet. Br. 13.

[11] If footnote 5 on page 18 of respondent's brief is intended to suggest that the Mutiny Act of 1803 permitted the trial of troops in England in peacetime under the circumstances of this case, we cannot find any authority, and certainly the authorities cited by respondent do not support that proposition.

We submit, that when viewed in its most favorable light, the respondent's presentation supporting court-martial jurisdiction over non-military offenses committed by servicemen in the circumstances of this case, is "too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution, for constitutional adjudication." See *McElroy* v. *Guagliardo*, *supra*, at 284, quoting from Mr. Justice Frankfurter's concurring opinion in *Reid* v. *Covert*, *supra*, at 64.

Conclusion

The Judgment below should be reversed.

Respectfully submitted,

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January 20, 1969

SUPREME COURT OF THE UNITED STATES

No. 646.—October Term, 1968.

James F. O'Callahan, Petitioner,
v.
J. J. Parker, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 2, 1969.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner, then a sergeant in the United States Army, was stationed in July 1956, at Fort Shafter, Oahu, in the Territory of Hawaii. On the night of July 20, while on leave with an evening pass, petitioner and a friend left the post dressed in civilian clothes and went into Honolulu. After a few beers in the bar of a hotel, petitioner entered the residential part of the hotel where he broke into the room of a young girl, assaulted and attempted to rape her. While fleeing from her room onto Waikiki Beach, he was apprehended by a hotel security officer who delivered him to the Honolulu city police for questioning. After determining that he was a member of the Armed Forces, the city police delivered petitioner to the military police. After extensive interrogation, petitioner confessed and was placed in military confinement.

Petitioner was charged with attempted rape, housebreaking, and assault with attempt to rape, in violation of Articles 80, 130, and 134 of the Uniform Code of Military Justice.[1] He was tried by court-martial, con-

[1] Article 80 of the Articles of War (10 U. S. C. § 880) provides:
"(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending,

victed on all counts, and given a sentence of 10 years' imprisonment at hard labor, forfeiture of all pay and allowances, and dishonorable discharge. His conviction was affirmed by the Army Board of Review and, subsequently, by the United States Court of Military Appeals.

Under confinement at the United States Penitentiary at Lewisburg, Pennsylvania, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania, alleging, *inter alia*, that the court-martial was without jurisdiction to try him for nonmilitary offenses committed off-post while on leave. The District Court denied relief without considering the issue on the merits, and the Court of Appeals for the Third Circuit affirmed. This Court granted certiorari limited to the question:

> "Does a court-martial, held under the Articles of War, Tit. 10 U. S. C. § 801 *et seq.*, have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian

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even though failing to effect its commission, is an attempt to commit that offense.

"(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed."

Article 130 (10 U. S. C. § 930) provides:

"Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of house-breaking and shall be punished as a court-martial may direct."

Article 134 (10 U. S. C. § 934) provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offense not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, specific, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?" 393 U. S., at 822.

The Constitution gives Congress power to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14, and it recognizes that the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Article III trials need apply. The Fifth Amendment specifically exempts "cases arising *in the land and naval forces* or in the militia, when in actual service in time of war or public danger" from the requirement of prosecution by indictment and, inferentially, from the right to trial by jury. See *Ex parte Quirin*, 317 U. S. 1, 40 (1943). The result has been the establishment and development of a system of military justice with fundamental differences from the practices in the civilian courts.

If the case does not arise *"in the land or naval forces,"* then the accused gets *first* the benefit of an indictment by a grand jury and *second*, a trial by jury before a civilian court as guaranteed by the Sixth Amendment and by Art. III, § 2, of the Constitution which provides:

> "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Those civil rights are the constitutional stakes in the present litigation. What we wrote in *Toth* v. *Quarles*, 350 U. S. 11, 17–18, is worth emphasis:

> "We find nothing in the history or constitutional treatment of military tribunals which entitles them

to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

"Moreover, there is a great difference between trial by jury and trial by selected members of the military forces. It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions

> of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc. But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury."

A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers [2] empowered to act by a two-thirds vote. The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but by a military law officer.[3] Substantially different rules of evidence and procedure apply

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[2] Under Art. 25 (c) of the Uniform Code of Military Justice, 10 U. S. C. § 825 (c), at least one-third of the members of the court-martial trying an enlisted man are required to be enlisted men if the accused requests that enlisted personnel be included in the court-martial. In practice usually only senior enlisted personnel, *i. e.*, noncommissioned officers, are selected. See *United States* v. *Crawford*, 15 U. S. C. M. A. 31 (1964), motion for leave to file petition for certiorari denied, 380 U. S. 970. See generally, Schlesser, Trial by Peers: Enlisted Members on Courts-Martial, 15 Cath. U. L. Rev. 171 (1966).

[3] At the time petitioner was tried, a general court-martial was presided over by a "law officer," who was required to be a member of the bar and certified by the Judge Advocate General for duty as a law officer. U. C. M. J. Art. 26 (a). The "law officer" could be a direct subordinate of convening authority. Manual for Courts-Martial, 1951, ¶ 4 (g) (1). The Military Justice Act of 1968, Pub. L. 90-632, 82 Stat. 1336, establishes a system of "military judges" intended to insure that where possible the presiding officer of a court-martial will be a professional military judge, not directly subordinate to the convening authority.

in military trials.[4] Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.[5]

A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.[6]

That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty. This Court, mindful of the genuine need for special military courts, has recognized their propriety in their appropriate sphere, *e. g., Burns* v. *Wilson*, 346

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[4] For example, in a court-martial, the access of the defense to compulsory process for obtaining evidence and witnesses is, to a significant extent, dependent on the approval of the prosecution. *United States* v. *Harvey*, 8 U. S. C. M. A. 538 (1957) approving, Manual for Courts-Martial, 1951, ¶ 115a. See Melnick, The Defendant's Right to Obtain Evidence: An Examination of the Military Viewpoint, 29 Mil. L. Rev. 1 (1965).

[5] See *e. g.*, the cases listed in Hearings on Constitutional Rights of Military Personnel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 2d Sess., 780–781 (1962), in each of which the Court of Military Appeals reversed court-martial convictions on grounds of excessive command influence.

[6] See *Reid* v. *Covert*, 354 U. S. 1, 36 (1957).

U. S. 137 (1953), but in examining the reach of their jurisdiction, it has recognized that

> "There are dangers lurking in military trial which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. . . . Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to the 'least possible power adequate to the end proposed.'" *Toth* v. *Quarles*, 350 U. S. 11, 22–23 (1955).

While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. Article 134, already quoted, punishes as a crime "all disorders and neglects to the prejudice of good order and discipline in the armed forces." Does this satisfy the standards of vagueness as developed by the civil courts? It is not enough to say that a court-martial may be reversed on appeal. One of the benefits of a civilian trial is that the trap of Article 134 may be avoided by a declaratory judgment proceeding or otherwise. See *Dombrowski* v. *Pfister*, 380 U. S. 479. A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while the military trial is marked by the age-old manifest destiny of retributive justice.[7]

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[7] For sobering accounts of the impact of so-called military justice on civil rights of members of the Armed Services see Hearings, Subcommittee on Constitutional Rights, S. Judiciary Committee

As recently stated. "None of the travesties of justice perpetuated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice." Glasser, Justice and Captain Levy, 12 Columbia Forum 46, 49 (1969).

The mere fact that petitioner was at the time of his offense and of his court-martial on active duty in the Armed Forces does not automatically dispose of this case under our prior decisions.

We have held in a series of decisions that court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times of both the offense and the trial. Thus discharged soldiers cannot be court-martialed for offenses committed while in service. *Toth* v. *Quarles*, 350 U. S. 11 (1955). Similarly, neither civilian employees of the Armed Forces overseas, *McElroy* v. *Guagliardo*, 361 U. S. 281 (1960); *Grisham* v. *Hagan*, 361 U. S. 278 (1960); nor civilian dependents of military personnel accompanying them overseas, *Kinsella* v. *Singleton*, 361 U. S. 234 (1960); *Reid* v. *Covert*, 354 U. S. 1 (1957), may be tried by court-martial.

These cases decide that courts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline. From these cases, the Government invites us to draw the conclusion that once it is established that the accused

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pursuant to S. Res. No. 260, 87th Cong., 2d Sess., Feb. 20 and 21, March 1, 2, 6, 9, and 12, 1962; Joint Hearings, Subcommittee on Constitutional Rights, S. Judiciary Committee and S. Armed Services Committee, 89th Cong., 2d Sess., on S. 745 et al., Pt. 1, Jan. 18, 19, 25, and 26, March 1, 2, and 3, 1966, and Pt. 2. For a newly enacted Military Justice Act see Pub. L. 90-632, 82 Stat. 1336. And see Constitutional Rights of Military Personnel, Summary—Report of Hearings, S. Res. No. 58, 88th Cong. 1st Sess., 1963.

is a member of the Armed Forces, lack of relationship between the offense and identifiable military interests is irrelevant to the jurisdiction of a court-martial.

The fact that courts-martial have no jurisdiction over nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged. Nor do the cases of this Court suggest any such interpretation. The Government emphasizes that these decisions—especially *Kinsella* v. *Singleton*—establish that liability to trial by court-martial is a question of "status"—"whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval forces.'" 361 U. S., at 241. But that is merely the beginning of the inquiry, not its end. "Status" is necessary for jurisdiction; but it does not follow that ascertainment of "status" completes the inquiry, regardless of the nature, time, and place of the offense.

Both in England prior to the American Revolution and in our own national history military trial of soldiers committing civilian offenses has been viewed with suspicion.[8] Abuses of the court-martial power were an important grievance of the parliamentary forces in the English constitutional crises of the 17th century. The resolution of that conflict came with the acceptance by William and Mary of the Bill of Rights in 1689 which established that in the future, Parliament, not the Crown, would have the power to define the jurisdiction of courts-martial. 1 W. & M. c. 2. The 17th century conflict over the proper

[8] The record of historical concern over the scope of court-martial jurisdiction is extensively reviewed in MR. JUSTICE BLACK's opinion for a plurality of the Court in *Reid* v. *Covert*, 354 U. S. 1, 23–30 (1957). See also, Duke & Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 13 Vand. L. Rev. 435, 441–449 (1960); F. B. Wiener, Civilians Under Military Justice (1967) (hereinafter cited as Wiener).

role of courts-martial in the enforcement of the domestic criminal law was not, however, merely a dispute over what organ of government had jurisdiction. It also involved substantive disapproval of the general use of military courts for trial of ordinary crimes.[9]

Parliament, possessed at last of final power in the matter, was quick to authorize, subject to annual renewal, maintenance of a standing army and to give authority for trial by court-martial of certain crimes closely related to military discipline. But Parliament's new power over courts-martial was exercised only very sparingly to ordain military jurisdiction over acts which were also offenses at common law. The first of the annual mutiny acts, I W. & M. c. 5, set the tone. It established the general rule that

> ". . . no man may be forejudged of life or limb, or subjected to any kind of punishment by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm."

And it proceeded to grant courts-martial jurisdiction only over mutiny, sedition, and desertion. In all other respects, military personnel were to be subject to the "ordinary process of law."

The jurisdiction of British courts-martial over military offenses which were also common-law felonies was from time to time extended,[10] but, with the exception of one year,[11] there was never any general military jurisdiction

[9] See *Reid v. Covert*, 354 U. S. 1, 23–26.

[10] See Wiener, c. 1.

[11] The Mutiny Act of 1720, 7 Geo. I c. 6, provided that a soldier could be court-martialed for "any Capital Crime or . . . any Violence or Offense against the Person, Estate or Property of any of the Subjects of this Kingdom, which is punishable by the known Laws of the Land" unless the civil authorities within eight days of the offense demanded that the accused soldier be turned over to them

to try soldiers for ordinary crimes committed in the British Isles. It was, therefore, the rule in Britain at the time of the American Revolution that a soldier could not be tried by court-martial for a civilian offense committed in Britain; instead military officers were required to use their energies and office to insure that the accused soldiers would be tried before a civil court.[12] Evasion and erosion of the principle that crimes committed by soldiers should be tried according to regular judicial procedure in civil, not military courts, if any were available, were among the grievances of protested by the American Colonists.[13]

Early American practice followed the British model.[14] The Continental Congress, in enacting articles of war

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for trial. In November 1720, the law officers of the Army relied on this new provision of the Mutiny Act to give an opinion that it was proper to try a soldier in Scotland—where ordinary civil courts were functioning—by court-martial for an offense which would have been murder if prosecuted in the civil courts. See Wiener, 245–246. The very next year—perhaps in response to that ruling, Wiener, at 14—the provision was eliminated and did not reappear. The 1721 Act and its successors provided for military trial of common law crimes only where ordinary civil courts were unavailable. See Prichard, The Army Act and Murder Abroad (1954), Camb. L. J. 232; Wiener, 14, 24–28.

[12] Failure to produce a soldier for civil trial was a military offense by the officer concerned. *E. g.*, British Articles of War of 1765, § 11, Art. 1, reprinted in Winthrop, Military Law and Precedents 1448, 1456 (1895, reprinted 1920). Hereinafter cited as Winthrop.

[13] See *Reid* v. *Covert*, 354 U. S. 1, 27–28 and n. 49.

[14] In its brief the Government lists a large number of courts-martial in the very early days of the Nation which it claims indicate that military trial for civil offenses was common in that period. The facts of the cases, as reflected in the brief summaries which are available to us, suggest no such conclusion. In almost every case summarized, it appears that some special military interest existed. Many are peculiarly military crimes—desertions, assaults on and thefts from other soldiers, stealing government property. While those acts might also be felonies, by the time of the Revolutionary

in 1776, emphasized the importance of military authority cooperating to insure that soldiers who committed crimes were brought to justice. But it is clear from the context of the provision it enacted that it expected the trials would be in civil courts.[15] The "general article," which punished "all crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war," was interpreted to embrace only crimes the commission of which had some direct impact on military discipline. Winthrop, *1123. While practice was not altogether consistent, during the 19th century court-martial convictions for ordinary civil crimes were from time to time set aside by the reviewing authority on the ground that the charges recited only a violation of the general criminal law and failed to state a military offense. *Id.*, *1124, n. 82, 88.[16]

War offenses such as this long had been defined as distinctively military crimes in the Mutiny Acts. Many of the remainder are identifiably prosecutions for abusing military position by plundering the civil population or abusing its women while on duty. Many of the other cases in which the offense is stealing or assault on an individual were perhaps of this sort also, especially where the victim is referred to as "inhabitant." Most of the rest simply recite the offender and the offense and give no basis for judging the relationship of the offense to military discipline. Those few which do appear to involve civilian crimes in clearly civilian settings appear also to have been committed by officers. In the 18th century at least the "honor" of an officer was thought to give a specific military connection to a crime otherwise without military significance. Moreover, all those courts-martial held between 1773 and 1783 were for the trial of acts committed in wartime and, given the pattern of fighting in those days, in the immediate theater of operations.

[15] 1776 Articles of War, § 10, Art. 1, reprinted in Winthrop, at *1494.

[16] Compare *Ex parte Mason*, 105 U. S. 696, 698 (1882), in which the Court, sustaining a court-martial conviction, under the general

During the Civil War, Congress provided for military trial of certain civil offenses [17] without regard to their effect on order and discipline, but the act applied only "in time of war, insurrection, or rebellion." Act of Mar. 3, 1863, c. 75, § 30; Rev. Stat. § 1342, Art. 58 (1873–1874). In 1916, on the eve of World War I, the Articles of War were revised, 39 Stat. 650, to provide for military trial, even in peacetime, of certain specific civilian crimes committed by persons "subject to military law" and the general article was modified to provide for military trial of "all crimes and offenses not capital." In 1950, the Uniform Code of Military Justice extended military jurisdiction to capital crimes as well.

We have concluded that the crime to be under military jurisdiction must be service-connected, lest "cases arising in the land and naval forces or in the militia, when in actual service in time of war or public danger," [18] as used

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article, of a military guard who killed a prisoner, said, "shooting with intent to kill is a civil crime, but shooting by a soldier of the army standing guard over a prison with intent to kill a prisoner confined therein is not only a crime against society, but an atrocious breach of military discipline."

[17] Larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to kill, wounding by shooting or stabbing with an intent to commit murder, rape, or assault and battery with an intent to commit rape. Rev. Stat. § 1342, Art. 58 (1873–1874).

[18] It has been suggested, at various times, that the phrase "when in actual service in time of war or public danger" should be read to require a grand jury indictment is required in *all* cases "arising in the land or naval forces or in the Militia," except when the defendant is "in service in time of War or public danger." It was decided at a very early date, however, that the above clause modifies only "Militia." Thus, the generally accepted rule is that indictment by grand jury is *never* necessary "in cases arising in the land or naval forces" but is necessary for members of the militia, except when they have been "called into the actual Service of the United States [Art. II, § 2, U. S. Const.] to execute the Laws of

in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers. The power of Congress to make "rules for the government and regulations of the land and naval forces," Art. I, § 8, cl. 14, need not be sparingly read in order to preserve those two important constitutional guarantees. For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights. We were advised on oral argument that Art. 134 is construed by the military to give it power to try a member of the armed services for income tax evasion. This article has been called "a catch-all" that "incorporates almost every Federal penal statute into the Uniform Code." Everett, Military Justice in the Armed Forces of the United States, pp. 68–69 (1956). The catalogue of cases put within reach of the military is indeed long; and we see no way of saving to servicemen and women in any case

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the Union, suppress Insurrections and repel Invasions." Art. I, § 8, U. S. Const.

"The limitation as to 'actual service in time of war or public danger' relates only to the militia." *Ex parte Mason*, 105 U. S. 696, 701. See also *Smith* v. *Whitney*, 116 U. S. 167, 186; *Kurtz* v. *Moffett*, 115 U. S. 487, 500; *Dynes* v. *Hoover*, 20 How. 65.

Johnson v. *Sayre*, 158 U. S. 109, was a case in which a Navy paymaster sought habeas corpus from his court-martial conviction for embezzlement in time of peace by arguing that he was entitled to indictment by grand jury.

"The decision below is based upon the construction that the words 'when in actual service in time of war or public danger' refer, not merely to the last antecedent, 'or in the militia,' but also to the previous clause, 'in the land or naval forces.' That construction is grammatically possible. But it is opposed to the evident meaning of the provision, taken by itself, and still more so, when it is considered together with the other provisions of the Constitution." *Id.*, at 114. And see *Thompson* v. *Willingham*, 217 F. Supp. 901 (D. C. M. D. Pa. 1962), aff'd, 318 F. 2d 657 (C. A. 3d Cir. 1963).

the benefits of indictment and of trial by jury, if we conclude that this petitioner was properly tried by court-martial.

In the present case petitioner was on leave when he committed the crimes with which he is charged. There was no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.

Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.[19]

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[19] Winthrop in commenting on the phrase "to the prejudice of good order and military discipline" in a predecessor article to Article 134 said:

". . . A crime, therefore, to be cognizable by a court-martial under this Article, must have been committed under such circumstances as to have directly offended against the government and discipline of the military state. Thus such crimes as theft from or robbery of an officer, soldier, post trader, or camp-follower; forgery of the name of an officer, and manslaughter, assault with intent to kill, mayhem, or battery, committed upon a military person; inasmuch as they directly affect military relations and prejudice military discipline, may properly be—as they frequently have been—the subject of charges under the present Article. On the other hand, where such crimes are committed upon or against *civilians* and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses." Pp. *1124–*1125.

We have accordingly decided that since petitioner's crimes were not service connected, he could not be tried by court-martial but rather was entitled to trial by the civilian courts.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 646.—October Term, 1968.

James F. O'Callahan, Petitioner, v. J. J. Parker, Warden. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 2, 1969.]

Mr. Justice Harlan, whom Mr. Justice Stewart and Mr. Justice White join, dissenting.

I consider that the terms of the Constitution and the precedents in this Court point clearly to sustaining court-martial jurisdiction in this instance. The Court's largely one-sided discussion of the competing individual and governmental interests at stake, and its reliance upon what are at best wholly inconclusive historical data, fall far short of supporting the contrary conclusion which the majority has reached. In sum, I think that the Court has grasped for itself the making of a determination which the Constitution has placed in the hands of the Congress, and that in so doing the Court has thrown the law in this realm into a demoralizing state of uncertainty. I must dissent.

I.

My starting point is the language of Art. I, § 8, cl. 14 of the Constitution, which empowers the Congress "to make rules for the Government and Regulation of the land and naval Forces," and the Fifth Amendment's correlative exception for "cases arising in the land or naval forces."

Writing for a plurality of the Court in *Reid* v. *Covert*, 354 U. S. 1 (1957), Mr. Justice Black explained that if the "language of Clause 14 is given its natural meaning . . . the term 'land and naval Forces' refers to persons who are members of the armed services . . . ," *id.*, at 19–20, and that accordingly the Fifth Amendment's ex-

ception encompasses persons "in the armed services." *Id.*, at 22–23. In *Kinsella* v. *Singleton*, 361 U. S. 234 (1960), again looking to the constitutional language, the Court noted that "military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense," *id.*, at 243; that is, whether the accused "is a person who can be regarded as falling within the term 'land and naval Forces.'" *Id.*, at 240–241.

In these cases and many others, *Ex parte Milligan*, 4 Wall. 2, 123 (1866); *Coleman* v. *Tennessee*, 97 U. S. 509 (1879); *Smith* v. *Whitney*, 116 U. S. 167, 184–185 (1886); *Johnson* v. *Sayre*, 158 U. S. 109, 114 (1895); *Grafton* v. *United States*, 206 U. S. 333, 348 (1907), this Court has consistently asserted that military "status" is a necessary *and sufficient* condition for the exercise of court-martial jurisdiction. The Court has never previously questioned what the language of Clause 14 would seem to make plain—that, given the requisite military status, it is for Congress and not the Judiciary to determine the appropriate subject-matter jurisdiction of courts-martial. See *Coleman* v. *Tennessee*, *supra*, at 514.

II.

English constitutional history provides scant support for the Court's novel interpretation of Clause 14, and the pertinent American history proves, if anything, quite the contrary.

The English history on which the majority relies reveals a long-standing and multifaceted struggle for power between the military and the Crown on the one hand, and Parliament on the other, which focussed, *inter alia*, on the King's asserted independent prerogative to try soldiers by court-martial in time of peace. See generally, J. R. Turner, English Constitutional Conflicts of the Seventeenth Century (1961). The martial law of the time was, moreover, arbitrary, and alien to established legal

principles. See 1 Blackstone's Commentaries 413; Hale, History and Analysis of the Common Law in England 42 (6th ed. 1820). Thus, when, with the Glorious Revolution of 1688, Parliament gained exclusive authority to create peacetime court-martial jurisdiction, it exercised that authority sparingly: the early Mutiny Acts permitted trial by court-martial only for the crimes of mutiny, sedition, and desertion. *E. g.*, Mutiny Act of 1688, 1 W. & M., c. 4.

Parliament subsequently expanded the military's peacetime jurisdiction both abroad and at home. See Mutiny Act of 1712, 12 Anne, c. 13; Mutiny Act of 1803, 32 Geo. 3, c. 20. And significantly, § 46 of the Mutiny Act of 1720, 7 Geo. 1, c. 6, authorized trial by court-martial for offenses of a nonmilitary nature, if the injured civilian made no request that the accused be tried in the civil courts. See F. Wiener, Civilians Under Military Justice 13–14, 245–246 (1967).[1]

The burden of English history was not lost on the Framers of our Constitution, who doubtless feared the Executive's assertion of an independent military authority unchecked by the people acting through the Legislature. Article 9, § 4, of the Articles of Confederation—from which Art. I, § 8, cl. 14, of the Constitution was taken[2]—was responsive to this apprehension:

> "The United States in Congress assembled shall . . . have the *sole and exclusive* right and power

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[1] This proviso was dropped in the Mutiny Act of 1721, 8 Geo. 1, c. 3, and court-martial jurisdiction over such offenses was thereafter limited by the articles of war to, *inter alia*, "Place[s] beyond the Seas . . . where there is no form of Our Civil Judicature in Force." F. Wiener, Civilians Under Military Justice 14 (1967).

[2] See 2 M. Farrand, The Records of the Federal Convention of 1787, 330 (1911); 5 J. Elliott, Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention in Philadelphia in 1787, 443 (1836).

> of . . . making rules for the government and regulation of the land and naval forces, and directing their operations." (Emphasis added.)

But nothing in the debates over our Constitution indicates that the *Congress* was forever to be limited to the precise scope of court-martial jurisdiction existing in 17th century England. To the contrary, Alexander Hamilton stated that Congress' power to prescribe rules for the government of the armed forces "ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent and variety of the means which may be necessary to satisfy them." The Federalist, No. 23. (Emphasis omitted.)

American exercise of court-martial jurisdiction prior to, and contemporaneous with, adoption of the Constitution lends no support to the Court's position. Military records between the end of the War of Independence and the beginning of the War of 1812 show frequent instances of trials by court-martial, east of the frontier, for offenses against civilians and the civil laws, such as theft, assault, and killing livestock.[3] Military authority to try soldiers

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[3] For example: The general orders of George Washington report the trial of soldiers for "killing a Cow . . . , stealing Fowls . . . , and stealing eleven Geese . . . ." 26 Writings of George Washington (1938 ed.) (H. Q., Newburgh, January 28, 1783), and "for stealing a number of Shirts and blanketts out of the public store at Newburgh . . . ." *Id.*, at 322 (H. Q. Newburgh, April 15, 1783). The Order Books of the Corps of Artillerists and Engineers report the court-martial of Sergeant Harris for "beating a Mr. Williams an inhabitant living near this garrison," Book 1, pp. 157, 158 (West Point, October 5, 1795), and of Private Kelly for "abusing and using violence on Mrs. Crunkhyté, a citizen of the United States." Book 3, pp. 45, 46 (West Point, July 5, 1796). Numerous other instances of military punishment for nonmilitary crimes during the period 1775–1815 are summarized in the appendix to the Brief for the United States, pp. 35–52.

for such offenses derived initially from the "general article" of war, first enacted by the Continental Congress in 1775,[4] and incorporated today in Art. 134, 10 U. S. C. § 934. Winthrop's Military Law and Precedents (2d ed. 1895), the leading 19th century treatise on military law, recognized that the general article encompassed crimes "committed upon or against civilians . . . at or *near* a military camp or post," *id.*, at 724 (1920 reprint) (emphasis added), and noted that even this limiting principle was not strictly observed. *Id.*, at 725, 730–732. And in *Grafton* v. *United States*, 206 U. S. 333, 348 (1907), the Court held, with respect to the general article, that:

> "The crimes referred to in that article manifestly embrace those not capital, committed by officers or soldiers in violation of public law as enforced by the civil power. No crimes committed by officers or soldiers of the Army are excepted by the . . . article from the jurisdiction thus conferred upon courts-martial except those that are capital in nature. . . . [T]he jurisdiction of general courts-martial [is] . . . concurrent with that of the civil courts." [5]

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[4] "All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and punished at their discretion." In Winthrop, Military Law and Precedents 957 (2d. ed. 1895, 1920 reprint).

[5] In 1916, Congress for the first time explicitly authorized peacetime court-martial jurisdiction for specific noncapital offenses. Article 93, Articles of War, 39 Stat. 650. It also revised the general article, renumbered Article 96, to read:

"Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all

Even if the practice of early American courts-martial had been otherwise, this would hardly lead to the conclusion that Congress lacked power to authorize military trials under the present circumstances. It cannot be seriously argued as a general matter that the constitutional limits of congressional power are coterminous with the extent of its exercise in the late 18th and early 19th centuries.[6] And however restrictively the

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crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

Testifying before the Senate Subcommittee on Military Affairs, Brigadier General Crowder, the Judge Advocate General of the Army, explained the revision (compare n. 4, *supra*):

"You will notice some transposition of language. The phrase 'to the prejudice of good order and military discipline' is put in such a way that it qualifies only 'all disorders and neglects.' As the law stands to-day it was often contended that this phrase qualifies also 'all crimes not capital.' There was some argument about whether it would reach back through that clause, 'all disorders and neglects' to the clause 'all crimes not capital' and qualify the latter clause. . . . [B]ut Justice Harlan, in the decision in the Grafton case, seems to have set the matter at rest, and I am proposing legislation along the lines of Justice Harlan's decision." Hearings before the Senate Subcommittee on Military Affairs, an Appendix to S. Rep. No. 130, 64th Cong., 1st Sess., 25, 91.

The Act of March 3, 1863, c. 75, § 30, 12 Stat. 731, 736, authorized punishment for specific nonmilitary crimes, including capital ones, in time of war, insurrection, or rebellion. Article 92 of the 1916 Articles of War, 39 Stat. 650, made murder and rape punishable by death, but provided that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." This proviso was deleted in the Uniform Code of Military Justice, Articles 118, 120, 10 U. S. C. §§ 918, 920, so that today there is no jurisdictional distinction between capital and noncapital offenses.

[6] On such a theory, for example, Congress could not have permissibly waited, as it did, until 1875, see Act of March 3, 1875, § 1,

power to define court-martial jurisdiction may be construed, it would be patently wrong so to limit that power. The disciplinary requirements of today's armed force of over 3,000,000 men [7] are manifestly different from those of the 718-man army [8] in existence in 1789. Cf. The Federalist, No. 23, quoted, *supra*, at 4. By the same token, given an otherwise valid exercise of the Article I power, I can perceive no basis for judicial curtailment of court-martial jurisdiction as Congress has enacted it.

III.

In the light of the language and history of Art. 1, § 8, cl. 14 of the Constitution, and this Court's hitherto consistent interpretation of this provision, I do not believe that the resolution of the controversy before us calls for any balancing of interests. But if one does engage in a balancing process, one cannot fairly hope to come up with a meaningful answer unless the interests on both sides are fully explored. The Court does not do this. Rather, it chooses to ignore strong and legitimate governmental interests which support the exercise of court-martial jurisdiction even over "nonmilitary" crimes.

The United States has a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military services. Furthermore, because its personnel must, perforce, live and work in close proximity with one another, the military has an obligation to protect each of its members from the

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18 Stat. 470, to confer general federal question jurisdiction on the district courts; the present-day exercise of this jurisdiction, see 28 U. S. C. § 1331, would be unconstitutional.

[7] Statistical Abstract of The United States 257 (1968).

[8] Weigley, History of the United States Army 566 (1967).

misconduct of fellow servicemen.[9] The commission of offenses against the civil order manifests qualities of attitude and character equally destructive of military order and safety. The soldier who acts the part of Mr. Hyde while on leave is, at best, a precarious Dr. Jekyll when back on duty. Thus, as General George Washington recognized:

> "All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other." 14 Writings of Washington 140–141 (1936 ed.).

A soldier's misconduct directed against civilians, moreover, brings discredit upon the service of which he is a member:

> "Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position . . . ." *Smith* v. *Whitney*, 116 U. S. 167, 183–184 (1886).

The Government, thus, has a proper concern in keeping its own house in order, by deterring members of the armed forces from engaging in criminal misconduct on or

[9] Congress may also assume the responsibility of protecting civilians from harms perpetrated by members of the armed forces. For the military is often responsible for bringing to a locality thousands of its personnel—whose numbers may be as great as, and sometimes exceed, the neighboring population—thereby imposing on the local law-enforcement agencies a burden which they may be unable to carry.

off the base, and by rehabilitating offenders to return them to useful military service.[10]

The exercise of military jurisdiction is also responsive to other practical needs of the armed forces. A soldier detained by the civil authorities pending trial, or subsequently imprisoned, is to that extent rendered useless to the service. Even if he is released on bail or recognizance, or ultimately placed on probation, the civil authorities may require him to remain within the jurisdiction, thus making him unavailable for transfer with the rest of his unit or as the service otherwise requires.

In contrast, a person awaiting trial by court-martial may simply be restricted to limits, and may "participate in all military duties and activities of his organization while under the restriction." Manual for Courts-Martial, United States (1969), ¶20 *b*. The trial need not be held in the jurisdiction where the offense was committed. *Id.*, ¶8. See, *e. g.*, *United States* v. *Vorhees*, 4 U. S. C. M. A. 509, 515, 16 C. M. R. 83 (1954); cf. *United States* v. *Gravitt*, 5 U. S. C. M. A. 249, 17 C. M. R. 249, 256 (1954). And punishments—such as forfeiture of pay, restriction to limits, and hard labor without confinement—may be imposed, which do not keep the convicted serviceman from performing his military duties. See Manual for Courts-Martial, *supra*, ¶¶126 *g*, *h*, *k*.

IV.

The Court does not explain the scope of the "service-connected" crimes as to which court-martial jurisdiction

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[10] Thus, at petitioner's presentence hearing, Captain Powell testified that "through proper rehabilitation, O'Callahan can make a good soldier," Record Transcript, p. 61, and Major Turner testified:

"He has given a superior performance, as far as I know. . . . He has gone through school and the Army does have a lot of money wrapped up in this man. . . . I think at this time, here that a rehabilitation program is in order." *Id.*, p. 64.

is appropriate, but it appears that jurisdiction may extend to "nonmilitary" offenses in appropriate circumstances. Thus, the Court intimates that it is relevant to the jurisdictional issue in this case that petitioner was wearing civilian clothes rather than a uniform when he committed the crimes. *Ante*, at 1. And it also implies that plundering, abusing, and stealing from, civilians may sometimes constitute a punishable abuse of military position, *ante*, at n. 14, and that officers may be court-martialed for purely civilian crimes, because "[i]n the 18th century, the 'honor' of an officer was thought to give a specific military connection to a crime otherwise without military significance."[11] *Ibid.* But if these are illustrative cases, the Court suggests no general standard for determining when the exercise of court-martial jurisdiction is permissible.

Whatever role an *ad hoc* judicial approach may have in some areas of the law, the Congress and the military are at least entitled to know with some certainty the allowable scope of court-martial jurisdiction. Otherwise, the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the jurisdictional issue in each instance. Absolutely nothing in the language, history, or logic of the Constitution justifies this uneasy state of affairs which the Court has today created.

I would affirm the judgment of the Court of Appeals.

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[11] It is, to say the least, strange that as a *constitutional* matter the military is without authority to discipline an enlisted man for an offense that it may punish if committed by an officer.